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IN THE

Supreme Court of the United States

October Term, 1958.

No. 169

GROCERY DRIVERS UNION LOCAL 848, etc., *et al.*,

Appellants,

vs.

SEVEN UP BOTTLING COMPANY OF LOS ANGELES, INCORPORATED,

Appellees.

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

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IN THE

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October Term, 1958.

No. .....

GROCERY DRIVERS UNION LOCAL 848, etc., *et al.*,

Appellants,

vs.

SEVEN UP BOTTLING COMPANY OF LOS ANGELES, INCORPORATED,

Appellees.

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the Supreme Court of the State of California, entered on January 16, 1958, affirming a decision of the Superior Court in and for the County of Los Angeles insofar as that decision awarded a money judgment in the amount of $15,023.32 against appellants, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

Opinions Below.

The Opinion of the Supreme Court of California, dated January 16, 1958, which is being appealed from, is printed in Appendix "A," pages 1-6, and is reported in 49 A. C. 634. The entry of judgment by the Supreme Court of California, dated January 16, 1958, is printed in Appendix "B," page 7. The Opinion of the Second District Court of Appeal of the State of California printed in Appendix "C," pages 8-24, is unreported but found in 144 A. C. A. 581. The judgment of the Superior Court in and for the County of Los Angeles dated September 17, 1954, is printed in Appendix "D," pages 25-29. The Findings of Fact and Conclusions of Law of the Superior Court in and for the County of Los Angeles, dated September 17, 1954, are printed in Appendix "E," pages 30-34. Appellants' Petition for Rehearing to the Supreme Court of California, filed on January 31, 1958, is printed in Appendix "F," pages 35-44. The California Supreme Court's denial of the Petition for Rehearing, dated February 13, 1958, is printed in Appendix "G," page 45. Notice of Appeal to the United States Supreme Court and proof of service thereof filed on May 7, 1958, is printed in Appendix "H," pages 46-51.

Jurisdiction.

This action was brought under Sections 1115 to 1120 of the Labor Code of the State of California (Jurisdictional Strikes Act). The judgment of the Supreme Court of the State of California in the instant case was entered on January 16, 1958. A timely Petition for Rehearing was filed and denied on February 13, 1958. A timely Notice of Appeal to the United States Supreme Court was filed on May 7, 1958. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28,

United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *La Crosse Telephone Corporation v. Wisconsin Board*, 336 U. S. 18; *Bethlehem Steel Company v. New York Board*, 330 U. S. 767.

Statutes Involved.

The relevant provisions of the National Labor Relations Act (29 U. S. C. 141 *et seq.*), as amended (61 Stat. 136) are set forth in Appendix "I," *infra*, pages 52-54. The California Jurisdictional Strikes Act, California Labor Code, Sections 1115 to 1120 (1947), is set forth in Appendix "J," *infra*, pages 55-56.

Questions Presented.

Did the Supreme Court of California err in ruling that the California Jurisdictional Strikes Act (Cal. Labor Code, Secs. 1115-1120), insofar as it authorizes an award of damages only against a labor union, is not repugnant to the Labor Management Relations Act (29 U. S. C. Sec. 141, *et seq.*) when applied to peaceable picketing in a labor dispute affecting interstate commerce?

In *San Diego Building Trades Council v. Garmon* (1957), 353 U. S. 26, this Court reversed the Supreme Court of California insofar as it had authorized the granting of injunctive relief but remanded to the state court on the question of damages. On January 16, 1958, the Supreme Court of California in 49 A. C. 605 upheld the award of damages in the *Garmon* case and in 49 A. C. 634 upheld the damage award in the instant case. The Supreme Court of California treated the instant case as controlled completely by its decision in the *Garmon* case, and on Feb. 13, 1958, it denied Appellants' Petition for Rehear-

ing in both the *Garmon* and the instant case. On June 23, 1958, this court granted the Petition for Certiorari in the *Garmon* case. The basic federal question presented by both cases is substantially the same, to wit: Is a state court's power to grant damages against labor unions for peaceable picketing arising out of a labor dispute affecting interstate commerce displaced by the National Labor Relations Act? As applied to the instant case, the question may be stated as follows:

Statement of the Case.

Outside of specific references made to the trial court reporter's transcript, the appellants adopt the following summary of the facts as set forth in the Opinion of the Supreme Court of California (Appx. "A," pp. 2-3).

Appellee, hereinafter referred to as the Company, is a corporation engaged in the business of producing, bottling and distribution of beverages. On March 4, 1949, it entered into a collective bargaining agreement with the Seven Up Employees' Association concerning the wages, hours, and working conditions of its non-supervisory employees. Appellants, all of whom are labor organizations or agents thereof, will be referred to hereinafter as the Union. Beginning in June, 1949, the Union engaged in peaceful picketing of retail stores which sold the Company's products. The picket signs stated that the Company's product was made by workers who were not members of the appellant Union, and that the Company was on the Union's "we do not patronize list." Truck drivers of suppliers, and some customers refused to cross the picket lines to make deliveries or respectively to make purchases. Some retail stores ceased handling the Company's products. The Union at no time engaged in any economic activities at the primary situs of the Company.

The Company filed an action against the Union in the Superior Court of the County of Los Angeles on June 29, 1949, seeking injunctive relief and damages under the California Jurisdictional Strikes Act (Cal. Labor Code, Secs. 1115-1120), enacted in 1947 (Appx. "J," pp. 55-56). The trial court sustained the Union's objection to the introduction of any evidence upon the theory that the Act was unconstitutional. On appeal, the Supreme Court of California in 40 Cal. 2d 368, 254 P. 2d 544 (March 10, 1953), Appendix "I," reversed this ruling and upheld the constitutionality of the State Act, and remanded to the Superior Court for trial. The Petition for Rehearing was denied on April 2, 1953.

At the beginning of the trial, October 16, 1953, the Union counsel moved for leave to amend the answer to allege the following: That the Company operated under a direct franchise granted by the Seven Up Company of St. Louis, Missouri, which gave the Company exclusive right to make and distribute Seven Up in the Los Angeles area; that all syrup or extract necessary to manufacture said drink was shipped from the parent company in St. Louis which advertised the product in national magazines; that the cost of such national advertising was included in the price paid by the Company for syrup and extracts; that the Company's purchases of said syrup exceeded the sum of $50,000 per year, and also that the Company purchased in excess of $100,000 in other materials from points outside the State of California; that, therefore, the Company was engaged in interstate commerce within the meaning of the National Labor Relations Act (29 U. S. C. 141 *et seq.*, 61 Stat. 136), and that exclusive jurisdiction over the acts alleged in the complaint was vested in the National Labor Relations Board [Clk. Tr. pp. 58-61]. The trial court denied this motion [Tr. Vol. III, p. 557], but admitted the

proposed amended answer into evidence as Defendants' Exhibit (a) [Tr. Vol. III, p. 560]. The Union also requested the trial court to permit the making of an offer of proof of the allegations of its proposed answer [Tr. Vol. III, p. 558]. The trial court similarly denied this request [Tr. Vol. III, p. 558]. The court based its denials of both the motion to amend the answer and the offer of proof upon the decision of *Sommer v. Metal Trades Council* (March 10, 1953), 40 Cal. 2d 392, 254 P. 2d 559, wherein it had been held that similar activities by a labor organization against a company engaged in interstate commerce fell within the area of concurrent jurisdiction by the National Labor Relations Board and state courts, both as to damages and injunctive relief. The trial court reasoned that the presence or absence of interstate commerce would not affect the state court's jurisdiction.*

Having been precluded from offering any evidence that the Company was substantially engaged in interstate commerce, the Union based its entire defense on the theory that the Seven Up Employees' Association was financed, interfered with, dominated and controlled by the Company and was therefore not a labor organization within the meaning of Section 1117 of the Labor Code of California. The trial commenced on October 29, 1953, and was taken under submission on December 8, 1953. The reporter's

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*The State Supreme Court in this connection stated: "Leave to amend was denied on the ground that even though the plaintiff's business effected interstate commerce the state court could exercise concurrent jurisdiction with the National Board." (Appendix "A", p. 3.)

transcript consists of 3,781 pages. During the trial, counsel for all parties stipulated that the Company had been damaged in the amount of $4,000 and therefore no evidence was offered on the subject [Tr. Vol. 23, pp. 1892-1894].

With the exception of evidence by the Company as to the nature of the Union's economic activities (most of which was readily admitted) and argument by counsel, the transcript consists almost in its entirety of conflicting evidence by the Company and the Union as to conduct on the part of the Company which the Union maintained, compelled a finding that the Company association was formed not by the employees, to promote their welfare, but rather by the Company for the sole purpose of creating a fictitious jurisdictional dispute to the end that legitimate labor organizations would be totally prevented from engaging in peaceable organizing activities among the employees.

The trial court found that the Union had interfered with the Company's business, that the interference arose out of a controversy between the Union and the Seven Up Employees' Association as to which should have the right to bargain collectively with the Company on behalf of its non-supervisory production employees and further arose out of a controversy as to which organization should have the exclusive right to have its members perform production, bottling and distribution work for the Company [Clk. Tr. p. 38]. On the question of the *bona fides* of the Seven

Up Employees' Association, the trial court rendered the simple finding that the Association was

> ". . . not found to be financed, in whole or in part, interfered with, dominated or controlled by the plaintiff or by any of plaintiff's officers or agents, either in their organization or operation in any manner whatsoever" [Clk. Tr. pp. 38 and 39].

The trial court issued a broad permanent injunction in effect restraining interference of any sort or character by the Union with the Company's business and awarded damages of $4,000 plus costs of $11,023.32 [Clk. Tr. pp. 41-44].

Proceedings in District Court of Appeal.

On appeal, the Union urged that the State Jurisdictional Strikes Act was repugnant to the National Labor Relations Act in that it sought to regulate activities falling within the exclusive jurisdiction of the National Labor Relations Board and that therefore the trial court lacked jurisdiction to grant injunctive relief and to award damages. The Union further contended that the evidence presented at the trial level was insufficient to support a finding that the Seven Up Employees Association was a *bona fide* labor organization within the meaning of Section 1117 of the Labor Code of California. Both of these contentions were rejected by the intermediate appellate court. In this connection the intermediate appellate court on the basis of *Sommer v. Metal Trades Council (supra)* affirmed the decision of the trial court denying leave to allege and prove the existence of interstate commerce (Appx. "C," pp. 19-22).

Proceedings in the State Supreme Court of California.

After granting the Union's Petition for Hearing, the State Supreme Court ruled that the trial court erred in denying appellants' motion to amend their answer and prove the fact of interstate commerce and, based upon this denial, the trial court lacked jurisdiction to grant an injunction and remanded this aspect of the case. The Court ruled, however, that the trial court was empowered to award damages against appellants without respect to whether interstate commerce was effected and therefore affirmed the damage award (Appx. "A," p. 5). In reaching this result, the California Supreme Court treated this case as controlled completely by its decision in *Garmon v. San Diego Building Trades Council, et al.,* 49 A. C. 605, argued and decided on the same day as the instant case. In that case, the State Supreme Court held that, although lacking jurisdiction to grant injunctive relief, it was empowered to award damages against a labor organization which engaged in peaceful picketing to compel an employer to execute a union shop contract at a time when the union did not represent a majority of the company's employees without regard to the affectation of interstate commerce. The Union's Petition for Certiorari in the *Garmon* case was granted in this Court on June 23, 1958. The appeal in the instant case is taken from the state Court's award of the money judgment.

THE QUESTIONS ARE SUBSTANTIAL.

The California Jurisdictional Strikes Act (Secs. 1115 to 1120 of the Cal. Labor Code) Insofar as it Authorizes an Award of Damages Against a Labor Organization Is Repugnant to the Labor Management Relations Act (29 U. S. C. Sec. 141, et seq.) When Applied to Peaceable Picketing in a Labor Dispute Effecting Interstate Commerce.

The instant case was decided on the same day as *Garmon v. San Diego Building Trades Council* (Jan. 16, 1958), 49 A. C. 605. As stated above, this Court granted the Petition for Certiorari in the *Garmon* case on June 23, 1958. Examination of the two decisions makes it readily apparent that the Supreme Court of California considered the jurisdictional problems in both cases as identical. In substance, the California Supreme Court reasoned the two cases as follows: The United States Supreme Court by its remand of *Garmon v. San Diego Building Trades Council* (1957), 353 U. S. 26, indicated that restrictions on the power of state courts to enjoin conduct that is an unfair labor practice in the area of interstate commerce are not applicable to an action for damages. Both cases involved instances of labor organizations which engaged in peaceable conduct in violation of the state public policy. Therefore, under the rationale of *United Construction Workers v. Laburnum Construction Corporation,* 347 U. S. 656, the State Court concluded that the Federal policy of labor relations would not be impaired by the granting of damages. In this regard, the State Court relied heavily on language in *Laburnum* distinguishing that case from *Garner v. Teamsters,* 346 U. S. 485, to wit:

> "here Congress has neither provided nor suggested any substitute for the traditional State Court procedure for collecting damages for injuries caused by tortious conduct (347 U. S. at 663-664)."

It is of course clear that the *Laburnum* case involved a markedly different problem than existed in *Garmon* and in the instant case. In *Laburnum,* the union employed means of violence to a degree almost without parallel in any trade dispute of recent years. It is elementary that State Courts may grant injunctive relief as to conduct which threatens a probable breach of the State's peace even when that conduct falls within the regulatory powers of the National Labor Relations Board. (*United A. A. & A. I. W. v. Wisconsin Employment Relations,* 351 U. S. 266; *Youngdahl v. Rainfair, Inc.,* 355 U. S. 131. It would necessarily follow therefore that the less drastic remedy of damages would be equally applicable in situations involving violent conduct. In both *Garmon* and the instant case, it was never suggested that the conduct engaged in by the Unions was anything other than peaceable. This distinction is aptly pointed out by this Court in the *Garmon* case wherein it is stated:

> "Laburnum sustained an award of damages under State tort law for violent conduct. We cannot know that the California court would have interpreted its own State law to allow an award of damages *in this different situation.*" (Emphasis added.)

It is clear therefore that the *Laburnum* case cannot serve as precedent for the answer to the problems posed by *Garmon* and the instant case. Furthermore, these cases cannot in any sense be said to be controlled by this Court's recent decisions in two cases. In *International Union, et al. v. Paul S. Russell* (May 26, 1948), 26 Law Week 4347, this Court was requested to pass upon the jurisdiction of a State Court to award damages to a non-union employee who was physically prevented by means of mass picketing from entering a struck plant and from engaging in his employment. This Court held that even assuming

the Union's conduct could have been found to constitute a violation of Section 8(b)(1)(a) of the National Labor Relations Act, the violent means employed by the Union paralleled the conduct found to exist in *Laburnum* to the end that the injured party's common law right of action was not cut off. As this Court stated:

> "If the employee's common law rights of action against a union tortfeasor are to be cut off, that would in effect grant to unions a substantial immunity from the consequences of *mass picketing or coercion such as was employed during the strike in the present case.*" (Emphasis added.)

This Court further stressed the fact that the means employed by the Union were of a type not protected by Federal law, nor prohibited to the extent that the National Labor Relations Board under Section 10(a) would be able to compensate the plaintiff for all damages suffered as a result of the violent conduct. Significantly this Court added that the strike was conducted in such a manner that it could have been enjoined by the Alabama courts. Therefore, this Court held that the added element of a possible limited recovery by the award of a back pay order under Section 10(a) was not sufficient to preclude a party's right to common law recovery of all damages sustained and therefore did not serve to distinguish this case from the rational of *Laburnum.* It is submitted that although the particular facts of violence in the *Russell* case arguably justify its analogy with *Laburnum,* those in the *Garmon* and in the instant case most emphatically do not.

The case of *International Association of Machinists v. Marcos Gonzales* (May 26, 1958), 26 Law Week 4355, similarly does not approach the problems raised by *Garmon* and the instant case. In *Gonzales,* this Court stressed the contractual relationship existing between unions and

their membership. This Court further emphasized that the action was treated at the state level by all parties as a breach of contract problem and not as one involving unfair labor practices. In this connection, this Court emphasized that the pleadings and proof of Gonzales and the Union did not disclose any facts bringing the conduct in question within the proscriptions of Section 8(b)(2) or any other section of the National Labor Relations Act. As this Court stated:

> "The suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under Section 8(b)(2)."

To the extent that the *Gonzales* decision was predicated on a contract theory, this Court in *Gonzales* simply reiterated the holding of the Supreme Court of Pennsylvania in *Philadelphia Marine Trade Association v. International Longshoremen's Association, et al.*, 382 Pa. 326, 115 A. 2d 733, *cert. den.* 350 U. S. 843, 76 S. Ct. 84, to the effect that collective bargaining agreements with employers engaged in interstate commerce are enforceable in State Courts. The *Gonzales* decision apparently extends this doctrine to embrace within it another type of collective contract, to wit: Contracts between unions and their membership. Moreover, it is noted that this Court in *Gonzales* makes specific reference to that portion of Section 8(b)(1) of the Act which removes from the jurisdiction of the National Board the right of a labor union to control its rules as to acquisition and retention of membership.

These decisions will be discussed more extensively *infra* but suffice it to say that the rationale of the majority in the *Russell* case, which involved violence of a type, and its ra-

tional in the *Gonzales* case, which involved breach of contract, to the effect that the assertion of state court jurisdiction would not substantially frustrate national policy is not applicable in the least to the problems raised by the *Garmon* and the instant case.

The ultimate test of state court jurisdiction to regulate either by the injunctive process or damages in the area of interstate commerce is whether a reasonable likelihood exists that the application of state law will produce a conflict in the application of substantive policies between the state and federal government with regard to conduct condemned or protected. This likelihood of conflict of policies is the sole consideration to be weighed, whether damages or injunctive relief, violence or peaceful picketing, common-law or statutory rights to recovery are involved. As stated in the *Garner* case:

> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudication as are different rules of substantive law."

And in *United Auto Workers v. Paul Russell* (*supra*), the majority opinion in distinguishing that case from the *Garner* line of decisions, succintly states:

> "Our cases which hold that state jurisdiction is pre-empted are distinguishable. *In them we have been concerned lest one forum would enjoin, as illegal, conduct which the other forum would find legal, or that the states would restrict the exercise of rights guaranteed by the Federal Acts.*" (Emphasis added.)

The *Laburnum* and *Russell* cases aptly illustrate this concept. Arguably there could not have existed a conflict in application of substantive policies between Virginia law and the National Labor Relations Act since the violent conduct engaged in as a means of furthering an objective

declared unlawful by the Federal Act, was not protected by the National Labor Relations Board. By the same token, there are no provisions under the Federal Act for fully compensating a party injured in some manner during a labor dispute as a result of violence.

Arguably the *Gonzales* case does not present any substantial problems of conflict between state and federal substantive policies. Section 8(b)(1) specifically negatives any assumption that the Federal Act regulates labor organizations in the prescribing of rules with respect to acquisition and retention of membership. Presumptively, this subject is removed from the operation of the Federal Act. It is only where the labor organization interferes with the ousted member's right to employment that the Taft-Hartley provisions come into play. As stated before, neither the allegations nor the evidence adduced at trial raised any question of unfair labor practices but rather were directed exclusively to the state question of breach of contract. Furthermore, the action of the Union in the *Gonzales* case cannot be said to involve the exercise of federally protected rights.

It is submitted that neither the instant case nor the *Garmon* case provides any such assurance that state courts will not conflict with federal substantive policies by awarding damages. In both cases, the defendants engaged in peaceful picketing, not threats and violence; the conduct was of a type that the Board could find to be prohibited under Section 8(b) or protected activity under Section 7. Several illustrations of the inherent conflict between the state court's award of damages in the instant case and federal substantive policies are later discussed in detail. However, to make possible an overall view as to the Union's position, these illustrations are briefly noted at this point.

1. The allegations and findings of peaceable picketing at secondary companies bring the subject matter within the exclusive regulatory scheme established by Congress in Section 303(a)(1) and (b) of the Labor Management Relations Act (29 U. S. C. 303).

2. The allegations and findings that the Union's activities arose out of a controversy between the Union and the Seven Up Employees' Association as to which should have the exclusive right to have their members perform work for the Company bring the subject matter within the exclusive regulatory scheme established by Congress in Section 303(a)(4) and (b) of the Labor Management Relations Act (29 U. S. C. 303).

3. The State Supreme Court in passing upon the *bona fides* of the Seven Up Employees' Association infringed upon the area of jurisdiction entrusted exclusively to the National Labor Relations Board under Section 8(a)(2) and Section 160(a) of the National Labor Relations Act (29 U. S. C. 141 *et seq.*).

4. The Jurisdictional Strikes Act of California as applied in the area of interstate commerce interferes with the comprehensive Federal statutory scheme established to resolve issues of representation.

5. The Jurisdictional Strikes Act of California as applied in the area of interstate commerce interferes with the federally protected right to engage in peaceable organizational activities.

6. The Supreme Court of California in affirming the damage award undertook to adjudge and indirectly regulate as to matters falling exclusively within the jurisdiction of the National Labor Relations Board.

The Supreme Court of California Erred in Affirming the Ruling of the Trial Court Refusing to Permit the Union Defendants to Allege and Prove That the Labor Dispute Substantially Effected Interstate Commerce as a Defense to the Claim for Damages.

As set forth in the statement of facts, the Union counsel at the outset of the trial, moved for leave to amend the Union's answer and made an offer of proof of the facts establishing that the Company was engaged in interstate commerce. The trial court on its view that the presence of interstate commerce would not effect its jurisdiction to grant injunctive relief and damages refused to permit this evidence. The trial court, however, treated the Union's offer of proof as though interstate commerce had in fact been proven. In this connection the Court stated.

> "In the absence of an offer of proof it would be assumed on appeal that you were able to prove everything you have alleged. In other words, on this record you go to the appellate court with the best possible record you can have. It will be presumed that you can prove everything in there, and if on that basis the court thinks I am in error, the court will reverse us" [Tr. Vol. III, p. 558].

The District Court of Appeal in its decision (Appx. "C" hereto, *infra,* p. 8) dealt with the question of the trial court's refusal to permit the Union's proof of interstate commerce. In its discussion, the intermediate appellate court in effect treated the record as though interstate commerce had been established. The Court concluded that on the theory of *Sommer v. Metal Trades Council,* 42 Cal. 2d 392, 254 P. 2d 559, the presence of interstate commerce did not effect the jurisdiction of the trial court to grant injunctive relief and damages.

The Supreme Court of California made it clear that the sole basis of the trial court's refusal to permit the allegation and proof of interstate commerce was its view that the state court and National Labor Relations Board could exercise concurrent jurisdiction over the subject matter of the action. It reversed the trial court's ruling in this regard as to the question of injunctive relief and affirmed the ruling on the question of damages. This in effect was a declaration that the presence or absence of interstate commerce was immaterial as to the grant of damages, but highly material as to the award of injunctive relief.

Furthermore, counsel for the Union in their Petition for Rehearing specifically pointed out the confusion which resulted from the last two paragraphs of the decision. The Union counsel stated that he was uncertain as to whether the Supreme Court was treating the case as though interstate commerce was established or whether the cause should be remanded to the trial court for the taking of evidence of interstate commerce and he requested the State Supreme Court to clarify its decision in this respect (Appx. "F," p. 44). The Supreme Court of California as stated above denied this petition without comment (Appx. "G," p. 45).

The Union which timely raised the question of state court jurisdiction at the trial level and continued asserting it vigorously through the appellate tribunals of California is entitled to have this Court pass upon the substantial and important Federal questions which have been presented as if the existence of interstate commerce were actually shown on the record.

In *Brooklyn Savings Bank v. O'Neil,* 324 U. S. 697, this Court in passing upon a similar question, stated:

> "Where a state court fails to pass on evidence or make findings of fact *because under their view, the*

> *facts referred to are immaterial,* we are not relieved from the duty of examining the evidence for the purpose of determining what facts reasonably might be and presumably would be found therefrom by the state court." (Emphasis added.)

Again in *Carlson v. Washington,* 234 U. S. 103, 105, where a trial court failed to make findings on certain evidence giving rise to the asserted Federal question, but the appellate court dealt with the Federal question and decided it adversely to appellant, this Court stated:

> "While, in ordinary cases, we are bound by the findings of the state court of last resort respecting matters of fact, it is hardly necessary to say that *that court cannot, by omitting to pass upon the basic questions of fact, deprive a litigant of the benefit of a Federal right,* any more than it could do so by making findings that were wholly without support in the evidence." (Emphasis added.)

See also:

> *Merchants National Bank v. Richmond,* 256 U. S. 635.

The analogy of these decisions to the instant case is patent. Whereas the state court cannot prevent the raising of a Federal question by failing to make findings on evidence giving rise to the Federal question, a state court surely cannot prevent a union litigant from presenting to this Court important questions regarding Federal-State jurisdiction over labor disputes by the simple means of disallowing any evidence as to the existence of interstate commerce. If the rule were otherwise the doctrine of Federal pre-emption could be destroyed at will. Moreover, appellants have no further opportunity to prove their allegations of interstate commerce affectation *as to the damage* award because it is final.

The Supreme Court of California Exceeded Its Jurisdiction in Ruling That Damages Were Recoverable Against Labor Unions for Violation of the State's Jurisdictional Strikes Act Without Regard to the Affectation of Interstate Commerce and the Provisions Authorizing Suits for Damages Against Labor Unions Arising From Secondary Boycotts Contained in Section 303(a)(1) and (b) of the Labor Management Relations Act (29 U. S. C. 303(a)(1) and (b)).

The State Supreme Court found that the Union engaged in peaceable picketing at retail outlets which carried the Company's product and that some customers and delivery personnel refused to make purchases and deliveries respectively. Congress in Section 8(b)(4)(A) (29 U. S. C. 158(b)(4)(A)) made it an unfair labor practice for a labor organization

> "to engage in, or to induce or encourage the employees of any employer to engage in a strike or concerted refusal in the course of their employment to . . . perform any service, where an object thereof is . . . forcing or requiring . . . any employer or other person . . . to cease doing business with any other person. . . ."

Section 303(a)(1) and (b) of the Act, authorizes an action for damages by private parties in any competent court of jurisdiction where a labor organization engages in the conduct proscribed by Section 8(b)(4)(A). This action can be brought independently of any determination by the National Labor Relations Board as to whether this violation has occurred. (*International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corporation*, 72 S. Ct. 235, 342 U. S. 237.)

Congress has, by these sections, established a comprehensive regulatory scheme over certain conduct by labor organizations. In enacting these sections, Congress clearly manifested its intent that private remedies for damages would be governed exclusively by Section 303. Although permitting state courts to hear this type of action, it envisioned uniformity in the application of substantive principles by virtue of the fact that the state or federal trial court would be required to follow federal law and resort could be readily had to this Court in the event that questions of interpretation arose.

The Company could properly have predicated its claim for damages under Section 303 of the Act if it had simply alleged and proven that its operation effected interstate commerce. However, the pleadings and evidence as they presently stand do not support a damage award under this theory for the following reasons:

1. Since the pleadings did not allege the existence of interstate commerce, the Union was deprived of its right of removal to the United States District Court. (*Germania Insurance Co. v. Wisconsin*, 119 U. S. 473, 30 L. Ed. 461; Title 28 U. S. C. Sec. 1441.)

2. The only damages for which the Company can be recompensed under Section 303(a)(1) and (b) are those occasioned by the refusal of retail firms to handle the Seven Up product because of the pressure exerted on them by their employees and employees of other firms who have engaged in work stoppages as a result of inducement and encouragement by the Union. (*International Brotherhood of Electric Workers v. National Labor Relations Board*, 341 U. S. 694, 71 S. Ct. 954; *National Labor Relations Board v. Denver Building and Construction Trades Council*, 341 U. S. 675, 71 S. Ct. 943; *National*

Labor Relations Board v. International Rice Milling Company, 341 U. S. 665, 71 S. Ct. 961.) Any damages caused to the Company as a result of the refusal of retail stores to handle the Seven Up product are not compensable under this section insofar as the refusal was based upon customer boycott occasioned by the Union's peaceable concerted activities. (*Capital Service Inc. v. N. L. R. B.*, 347 U. S. 501, 74 S. Ct. 699.) Contrasting this limitation on damages with the broad mandate declared by the California Legislature in Section 1115 of the California Labor Code to the effect that any form of "interference" with the Company's operations is actionable in damages, it is unfair to suppose that the Union would have stipulated that the Company had been damaged in the amount of $4,000. The Company by avoiding the comprehensive scheme of damage regulation established under Section 303(a)(1) and (b) was spared the substantial problem of proving the extent to which their damages, if any, were occasioned by the Union's 'inducement" and "encouragement" of employees as distinguished from potential customers of the retail stores. Indeed, it is possible that the Company would have been unable to show any damages occasioned by "employee" inducement as distinguished from customer. Moreover, it is entirely possible that the refusal of the retail stores to stock the Company's product came about, partly at least, as a result of oral persuasion by the Union directed to the retail store employers. It may finally be noted in this regard that Paragraph V of the Company's Complaint [Clk. Tr. p. 17] alleged and the trial court found to be true [Clk. Tr. p. 38] that the Union placed the Company on the "unfair list of the Los Angeles Central Labor Council." Under the State Act requiring only "interference," this conduct is actionable in damages. (*Seven Up Bottling Company of Los Angeles v. Grocery Drivers Union Local No. 848* (*supra*).) The Federal Act

does not in Section 303 or any other section hold labor organizations liable in damages for "unfair listing." It is unknown, of course, the extent to which the damages occasioned by the "unfair listing" was included in the stipulated $4,000 amount.

It is submitted that Congress in Section 303(a)(1) and (b) having carefully set forth the type of Union conduct it desired to make actionable in damages, has legislated fully and completely on this subject to the exclusion of state laws which impose more extensive and burdensome damages upon labor organizations, the degree of which may be principally determined by the "variety of local procedures and attitudes toward labor controversies" which this Court noted in *Garner v. Teamsters (supra)* and subsequent decisions.

The Supreme Court of California Exceeded Its Jurisdiction in Ruling That Damages Were Recoverable Against Labor Unions for Violation of the State's Jurisdictional Strikes Act Without Regard to the Affectation of Interstate Commerce and the Provisions Authorizing Suits for Damages Against Labor Unions Arising From Jurisdictional Disputes Contained in Section 303(a)(4) and (b) of the Labor Management Relations Act (29 U. S. C. 303(a)(4) and (b)).

The trial court found that the "interference" with the Company's business by the Union arose out of a controversy between the Union and the Seven Up Employees' Association as to which should have the right to bargain collectively with the Company on behalf of its non-supervisory production employees and further arose out of a controversy as to which organization should have the exclusive right to have its members perform production,

bottling and distribution work for the Company [Clk. Tr. p. 38].

Congress in Section 8(b)(4)(D) (29 U. S. C. Sec. 158(b)(4)(D)) made it an unfair labor practice for a labor organization to engage in, or to induce, or encourage the employees of any employer to engage in a strike or concerted refusal in the course of their employment to perform any service, where an object thereof is to force an employer to assign work to employees in one labor organization as distinguished from another. As in the case of Section 8(b)(4)(A), Congress has authorized an independent action for damages under Section 303(a)(4) and (b) of the Act, in any Court having jurisdiction of the parties.

This concept has been discussed above and does not bear detailed treatment at this point. Suffice it to say, however, that Congress has in these sections established a comprehensive scheme of private remedies for certain types of damages arising out of jurisdictional disputes. Having limited the statutory damage action to disputes of a work assignment character, it precluded the attempt of states to expand the concept of jurisdictional disputes to include those of a representational nature.

As in the Section 8(b)(4)(A) situation, the Company could have predicated its action under Section 303(a)-(4) and (b). However, since the pleadings did not disclose the existence of interstate commerce the Union was deprived of its right of removal to the United States District Court. More importantly, however, since there has not been any findings that injury was caused to the Company by reason of the refusal of retail outlets to handle the Seven Up product because of pressure exerted against them by *"employees"* as distinguished from *customers,* the

damage award cannot be sustained on the present record below. (*National Labor Relations Board v. International Rice Milling Company* (*supra*).) Here again the trial court's findings of "interference" with the Company's operations although sufficient to sustain the damage award under the state act would not do so under the more restrictive sections of the Labor Management Relations Act.

The Supreme Court of California Lacked Jurisdiction to Find, Upon Conflicting Evidence, That the Seven Up Employees' Association Was Not "Financed, in Whole or in Part, Interfered With, Dominated or Controlled" by the Company as Required by the State's Jurisdictional Strikes Act, Since This Subject Is Pre-empted by Section 8(a)(2) and 10(a) of the National Labor Relations Act.

The most patent illustration of conflict between Federal and State substantive policies is found in the section of the State Act dealing with the *bona fides* of the labor organizations involved in the dispute. Section 1117 of the state statute defines labor organizations within the meaning of the Act as those not found to be "financed in whole or in part, interfered with, dominated or controlled by the employer" (Appx. "K," p. 56). The main defense available to a labor union sued under this Act is to show that another labor organization allegedly making a claim for representation or assignment of work is in fact financed, interfered with, dominated or controlled by the employer. Therefore in virtually every reported decision arising under the Jurisdictional Strikes Act, the state Court has passed upon evidence going to the *bona fides* of the labor union in question. (*Sommer v. Metal Trades Council*, 40 Cal. 2d 392, 254 P. 2d 559; *Voeltz v. Bakery*

Union, 40 Cal. 2d 382, 254 P. 2d 553; *Globe Dairy Lunch Company v. Joint Executive Board of Culinary Workers,* 117 Cal. App. 2d 190, 255 P. 2d 94; *Seven Up Bottling Company of Los Angeles v. Grocery Drivers Union Local* 848, 49 A. C. 606.) The state act does not provide any criteria to aid the courts in making this determination.

In Section 8(a)(2), Section 158(a)(2) of the National Labor Relations Act, it is made an unfair labor practice for a company "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it" (Appx. "I," p. 53). This Court, the National Board and the lower Federal Courts of this country have passed upon evidence of employer interferences of varying degrees with labor unions in virtually thousands of cases involving government prosecutions under this section. (*National Labor Relations Board v. Bradford Dyeing Company,* 310 U. S. 318, 60 S. Ct. 918; *National Labor Relations Board v. Link Belt Company,* 311 U. S. 584, 61 S. Ct. 358; *International Association of Machinists v. National Labor Relations Board,* 311 U. S. 72, 61 S. Ct. 83; *National Labor Relations Board v. American Laundry,* 138 F. 2d 889; *American Enka Corporation v. National Labor Relations Board,* 119 F. 2d 60; *H. J. Heinz Company v. National Labor Relations Board,* 311 U. S. 514; *Humble Oil and Refining Company v. National Labor Relations Board,* 113 F. 2d 285; *Sperry Gyroscope Company v. National Labor Relations Board,* 129 F. 2d 922.)

These together with the many other reported decisions involving the application of Section 8(a)(2) establish numerous guides to aid in analyzing the intricate details often times vital in determining whether a labor organization has been formed out of the desires of its membership

or whether it is simply an *alter ego* of the employer and subject to his control. If the National Board finds that a labor organization has been interfered with to some degree, then under Section 10(a), it routinely orders the employer to cease all relationships with that organization and to dissolve it if the interference amounts to domination.

Applying present Federal and California law on this subject, in the area of interstate commerce, one can reach the following anomalous result:

Upon the filing with the National Labor Relations Board of charges of a Section 8(a)(2) violation and the successful prosecution thereof, a Company will be ordered to cease dealing with or to dissolve the Union in question. A *bona fide* labor organization attempting to organize the employees of the Company engages in peaceable concerted activities in protest over the commission of these unfair labor practices. The Company in the meantime files an action for damages in the State Court based upon the Jurisdictional Strikes Act. The State Court hearing virtually the identical evidence as was presented to the National Board regarding the *bona fides* of the labor union determines that it is not "interfered with, dominated or controlled by the employer," finds that a jurisdictional dispute exists and awards damages against the protesting labor union for all "interference" with the company's business. Thus the activity of the defending union which is treated by the Federal government as protected activity in protest over the Section 8(a)(2) violation (*Mastro Plastics Corporation v. National Labor Relations Board*, 350 U. S. 270, 100 L. Ed. 309) is adjudged unlawful under the California Jurisdictional Strikes Act and held actionable in damages.

This real problem of conflicting state and federal substantive principles is the gravamen of the instant case. As stated earlier, the Union and Company offered voluminous evidence before the trial court as to the *bona fides* and lack thereof the Seven Up Employees' Association. It would serve no useful purpose at this time to reargue that issue. It is noted, however, that although the Supreme Court of California did not discuss the issue of *bona fides,* the District Court of Appeal in its decision (intermediate appellate court), Appendix "C," pages 15-18, set forth a brief summary of the type of evidence presented by the Company and Union in support of their respective positions. During the entire trial and throughout the Union's appeal to both the District Court of Appeal and the State Supreme Court, the Union vigorously asserted and does presently maintain that the evidence presented clearly showed that the Seven Up Association was dominated, interfered with, financed and controlled by the Company. The inherent vice in this situation is not that the Union quarrels with the findings of the state courts on this issue, but rather that the evaluation of evidence going to the *bona fides* or lack thereof of a labor organization is a function entrusted by Congress exclusively to the specialized agency it created to enforce the National Labor Relations Act.

In this connection it is noted that the trial court's findings on the issue of *bona fides* leave one completely mystified as to the standards and criteria applied by that Court in resolving this complex issue. The simple finding that the Association was ". . . not found to be financed, in whole or in part, interfered with, dominated or controlled by the plaintiff or by any of plaintiff's officers or agents, either in their organization or operation in any manner

whatsoever" [Clk. Tr. pp. 38 and 39] represents the only official word on this subject by the trial court. There is no way of knowing whether or not the trial court attempted to apply the extensive body of federal law on this subject. Therefore the end result is that a subject regulated exclusively by the federal agency was decided by a state tribunal by means of criteria completely unknown to the litigants. Conduct by the Union which would have been held to be protected by the National Labor Relations Board if it had viewed the evidence as to *bona fides* differently than the state court is presently the basis of a $15,023.32 damage award against the Union.

This Court appropriately stated in *Garner v. Teamsters* (*supra*):

> "Congress evidently considered that centralized administration of specially designed procedures were necessary to obtain uniform application of the substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies."

Having full regard for the holding in *Gonzales* that state regulation should not be displaced ". . . when the possibility of conflict with federal policy is . . . remote," it is submitted that the application of the *bona fides* section of the California Jurisdictional Strikes Act to labor disputes affecting interstate commerce presents an example of highly aggravated and direct conflict between federal and California substantive policies as to conduct protected or condemned.

The Application of the California Jurisdictional Strikes Act, supra, as a Basis for Granting Damages Infringed Upon Federally Protected Rights Guaranteed to the Union Under Section 7 of the National Labor Relations Act (29 U. S. C. 157).

Section 8(a)(5) of the Act makes it unlawful for the employer to refuse to bargain with the freely chosen majority representative of his employees. Where the Union presents the employer with proof of its majority status, the employer has an affirmative duty to bargain at that time unless he entertains a good faith doubt as to the fact of majority status in which case he can insist upon an election conducted by the National Labor Relations Board. (*Joy Silk Mills v. National Labor Relations Board,* 185 F. 2d 732, *cert. den.,* 341 U. S. 914; *North Electric Manufacturing Company v. National Labor Relations Board,* 123 F. 2d 887; *National Labor Relations Board v. Chicago Apparatus Company,* 116 F. 2d 753.) If the employer refuses to bargain with the majority representative of his employees selected either by means of authorization cards or secret ballot election, he is guilty of a Section 8(a)(5) unfair labor practice and peaceable picketing in protest over this conduct is a form of concerted activity affirmatively protected by the Act. (*Mastro Plastics Corporation v. National Labor Relations Board (supra).*)

A brief examination of the pertinent provision of the California Jurisdictional Strikes Act makes readily apparent its pronounced interference with the Federal process of selecting bargaining agents and the federal sanctions accorded to such agents. The State Act provides in

Section 1118 that a jurisdictional strike exists by reason of

> ". . . any . . . concerted interference . . . with an employer's . . . business arising out of a controversy between two or more labor organizations as to which of them *has or should have* the right to bargain collectively with an employer on behalf of his employees *or any of them. . . .*" (Emphasis added.)

Its proscriptions expressly apply where one labor organization commands the support of a majority of the employees. State decisions interpreting the statute have made it clear that the Jurisdictional Strikes Act applies even where one labor organization makes a *naked claim* of representation after a majority union has requested bargaining rights and engaged in concerted activities against the employer. (*Sommer v. Metal Trades Council (supra); Voeltz v. Bakery Union (supra); Globe Dairy Lunch Company v. Joint Executive Board of Culinary Workers (supra).*)

Combining the effect of the Taft-Hartley Act and the California Jurisdictional Strikes Act leads to the following anomaly: An employer whose business effects interstate commerce arbitrarily refuses to bargain in good faith with a labor organization selected by a majority of his employees either by means of authorization cards or a National Labor Relations Board secret ballot election. The labor union applies peaceable boycott measures in protest over the employer's conduct. The National Board orders the employer to bargain in good faith. A second labor organization in the meantime makes a naked claim of representation upon the employer without any showing of majority support. The employer files an action for damages under the State Act and obtains a money judg-

ment against the majority chosen labor union based upon "interference" to his business caused by the union's boycott measures. Therefore the activities by the majority union which are viewed as lawful and protected by the Federal government are held actionable in damages under the state act. The cases are legion that state policies which impair the exercise of federally protected rights are repugnant to the national policy of labor relations and must fall. (*Hill v. Florida,* 325 U. S. 588, 89 L. Ed. 1782; *Automobile Workers Union v. O'Brien,* 339 U. S. 454, 94 L. Ed. 978; *Bus Employees v. Wisconsin Employment Relations Board,* 340 U. S. 383, 95 L. Ed. 364.)

It is submitted that the California Jurisdictional Strikes Act as applied to industries affecting interstate commerce undermines the entire comprehensive structure established by Congress to insure an orderly means of determining representation problems and promoting collective bargaining between employers and labor unions. It has long been held that state laws which affect representation proceedings in industries engaged in interstate commerce are preempted by the National Labor Relations Act. (*Bethlehem Steel Corporation v. New York State Labor Relations Board,* 330 U. S. 767; *La Crosse Telephone Corporation v. Wisconsin Employment Relations Board,* 336 U. S. 18.)

Apart from its interference with the Federal procedure for resolving representational problems, the State Act penalizes the exercise of peaceable organizational activities protected under Section 7 of the Taft-Hartley Act. In this connection, although the state trial court found that the Union's activities grew out of a dispute involving representation and the question of which of the labor organizations was entitled to have its members perform work for the Company [Clk. Tr. p. 38], the National Board

may well have found in this case that the sole dispute concerned that of representation.* If the Board found that the activities alleged arose solely from a representation dispute, then it would have to further consider whether the conduct fell within the prohibitions of Section 8 or the protections of Section 7 of the Act. Congress in enacting Section 8(b)(4)(D) and Section 303(a)(4) and (b) restricted its definition of unlawful jurisdictional disputes to those arising from work assignment problems. The Act does not make a pure representation dispute unlawful *per se*. If the National Board found, however, that the Union's activities were designed to compel the Company to grant recognition status, it might prosecute the Union under Sections 8(b)(2) or 8(b)(1)(A) of the Act. (*Garner v. Teamsters*, 346 U. S. 485; *San Diego Building Trades Council v. Garmon*, 353 U.S. 26; *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, 353 U. S. 20; *District Lodge 34, International Association of Machinists v. L. R. Covett Company*, 353 U. S. 39.) On the other hand, if the Board found that the peaceable activities of the Union constituted a simple appeal to the consuming public for the purpose of enlisting their support in the Union's organizing campaign and not a demand for recognition as bargaining agent, it would refuse to prosecute thereby sanctioning the conduct. (*Garner v. Teamsters*, 346 U. S. 485; *Weber v. Anheuser-Busch*, 348 U. S. 468.) This Court's recent decision in *Youngdahl v. Rainfair, Inc.*, 355 U. S. 131, makes it clear that peaceable customer appeals by way of picketing are concerted activity within the meaning of Section 7 and designed to be left free of restraint. This concept is clari-

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*There is no evidence in the present record to support the "work assignment" objective found by the trial court.

fied still further by this Court's *per curiam* opinion in *Newell v. Chauffeurs Union*, 26 Law Week 3311, in which on the basis of *Thornhill v. Alabama*, 370 U. S. 88, it struck down the attempt of a state court to curtail peaceable organizational picketing.

The end result is that the activities of the union if found by the National Labor Relations Board to be organizational in character might be deemed protected by the Federal government while at the same time the state adjudged it actionable in damages.

The Supreme Court of California Erred in Ruling That It Had Jurisdiction to Award Damages Against the Union Arising Solely From Peaceable Concerted Activities Over Which the California Court Concededly Lacked Jurisdiction to Award Injunctive Relief.

The Company's claim for damages was bottomed on conduct over which the National Board has exclusive jurisdiction. In effect the Company asked the California Court to exercise jurisdiction which it did not have by determining matters which fell exclusively within the jurisdiction of the National Labor Relations Board, as a basis for granting damages. The Company not only sought damages for conduct which existed prior to the filing of the Complaint; it also alleged that ". . . said defendants have threatened to commit and to continue to commit said acts." And again,

> "If said defendants are permitted to continue their activities herein complained of, plaintiff will suffer great and irreparable injury, the amount of which is

and will be extremely difficult to ascertain, but in excess of Two Thousand Dollars ($2,000.00) . . ." [Clk. Tr. p. 19, line 13, to p. 20, line 25].

The Court was thus asked to do indirectly, by holding the Union to answer in damages for past conduct and for future conduct if it did not desist from the conduct complained of, what it had no jurisdiction to do directly, by enjoining the continuance of such conduct. The situation here is comparable to that before this Court in two cases involving the enforceability of restrictive covenants based upon race, color, and creed. In *Shelley v. Kraemer*, 334 U. S. 1, this Court held that for a state court to enforce such a covenant by the injunctive process would be tantamount to state action in violation of the Fourteenth Amendment of the United States Constitution. In *Barrows v. Jackson*, 346 U. S. 249, this Court held that an award of damages for violation of this type of covenant would amount to the licensing of state courts to enforce indirectly that which it could not enforce directly by injunction and would be equally beyond the jurisdiction of the Court by reason of the repugnancy of such conduct to the Federal Constitution.

The parallel is patent. Whereas this Court held in *Shelley* and *Barrows* that state courts lack jurisdiction to enforce restrictive covenants based upon conditions in derogation of the Fourteenth Amendment, either by damages or injunctive decree, the state courts of California lacked jurisdiction to enforce the Jurisdictional Strikes Act of California as to labor disputes affecting interstate

commerce whether the nature of the enforcement be injunction or damages by reason of repugnancy with the application of Federal substantive policy.

Respectfully submitted,

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APPENDIX "A".

Opinion of the Supreme Court of the State of California.

Seven Up Bottling Company of Los Angeles, Incorporated, Plaintiff and Respondent, v. Grocery Drivers Union Local 848, Etc., *et al.*, Defendants and Appellants. L. A. 23627.

Filed: Jan. 16, 1958.

This is an appeal by the defendants from a judgment enjoining them from picketing and other interference with the plaintiff's business in violation of the Jurisdictional Strike Act (Lab. Code, §§1115-1120), and awarding plaintiff $4,000 in damages for tortious conduct on the part of the defendants.

The plaintiff is a California corporation engaged in the production, bottling, and distribution of beverages. In March 1949 it entered into a collective bargaining agreement concerning the wages, hours, and working conditions of its nonsupervisory employees with the Seven Up Employees' Association. Beginning in June 1949 the defendants engaged in activities designed to compel the plaintiff to recognize the defendants as the exclusive bargaining representatives of the plaintiff's employees. To enforce their demand for recognition, the defendants began peaceful picketing of retail stores which sold the plaintiff's products. Picket signs announced that the plaintiff's products were made by workers who were not members of the defendant union, and that the plaintiff was on the defendants' "We Do Not Patronize List."

Truck drivers of suppliers refused to cross the picket lines to make deliveries, thus compelling some retail stores to cease handling the plaintiff's products. As a result of this activity on the part of the defendants there was a falling off in the plaintiff's business on account of which damages were sought and awarded.

Section 1118 of the Labor Code defines a jurisdictional strike as a "concerted interference with an employer's operation or business, arising out of a controversy between two or more labor labor organizations as to which of them has or should have the exclusive right to bargain collectively with an employer . . . [or] as to which of them has or should have the exclusive right to have its members perform work for an employer." Section 1115 declares that a "jurisdictional strike as herein defined is hereby declared to be against the public policy of the State of California and is hereby declared to be unlawful." Section 1116 provides that any person injured by the violation of the foregoing and other sections "shall be entitled to injunctive relief therefrom in a proper case, and to recover any damages resulting therefrom in any court of competent jurisdiction."

On an earlier appeal in this case the judgment for the defendants was reversed. It was there contended by the defendants that the Jurisdictional Strike Act was unconstitutional in that it constituted an invasion of the right of freedom of speech. It was held by this court that in its application to the facts alleged the act was constitutional. (Seven Up etc. Co. v. Grocery etc. Union, 40

Cal. 2d 368.) It was held further that the Labor Management Relations Act of 1947 (29 U. S. C. A., §141 et seq.) had no application as "There is no allegation showing that plaintiff was engaged in a business affecting interstate commerce. . . ."

Following the reversal, the defendants sought to amend their answer to allege that the plaintiff was engaged in interstate commerce and that exclusive jurisdiction over the conduct alleged was in the National Labor Relations Board. Leave to amend was denied on the ground that even though the plaintiff's business affected interstate commerce the state court could exercise concurrent jurisdiction with the National Board.

In Garmon v. San Diego Building Trades Council, this day decided, it was held that in labor disputes which involve business enterprises engaged in interstate commerce the power to grant equitable relief by way of injunction is beyond the jurisdiction of state courts. (See also San Diego Building Trades Council v. J. S. Garmon, 77 S. Ct. 607; Amalgamated Meat Cutters, Etc., v. Fairlawn Meats, 77 S. Ct. 604; Guss v. Utah Labor Relations Board, 77 S. Ct. 598.)

It was further held by this court in the Garmon case that labor union activities in violation of the declared policy of this state are unlawful; that they constitute tortious conduct, and that jurisdiction to render a judgment for damages resulting therefrom, although involving business enterprises engaging in interstate commerce, is vested in the courts of this state.

We are satisfied that the trial court was in error in holding that the state court had concurrent jurisdiction with the National Board in entertaining the controversy. If that question was at all of uncertain solution at the time the present action was commenced it was made certain by the recent decisions of the Supreme Court in the Garmon, the Amalgamated Meat Cutters and the Guss cases (March 25, 1957), above cited. It was held in those cases that in labor controversies affecting enterprises engaged in interstate commerce there is a conflict in injunctive relief which may be available under the National Act and that, available under the equity powers of the state court, and that in such a situation the federal law affords the exclusive remedy, thus depriving the state court of jurisdiction to issue injunctions.

The question of the power of the trial court to grant the injunctive relief awarded in this case is of vital importance. It goes to the jurisdiction of the court to proceed on that phase of the litigation. Apparently the status of the plaintiff's business, that is, whether it was engaged in interstate commerce and thus subject to the jurisdiction of the National Labor Relations Board pursuant to the Labor Management Relations Act (29 U. S. C. A., §141 et seq.), was not deemed of significance before the decision of this court establishing the constitutionality of the Jurisdictional Strike Act. (Seven Up etc. Co. v. Grocery etc. Union, *supra*, 40 Cal. 2d 368, 372.) The Labor Management Relations Act, however, as construed by the latest decisions of the Supreme Court of

the United States, above cited, would be applicable if the jurisdictional facts were developed. If alleged and proved they would deprive the trial court of jurisdiction to proceed by way of injunction. On the present state of the record it seems desirable to permit the defendants to amend their answer to allege and prove, if they are able to do so, that the plaintiff is engaged in interstate commerce.

As to the award of damages there is substantial evidence in support of the judgment in the amount specified.

The judgment is reversed insofar as it awards injunctive relief, and affirmed insofar as it awards damages to the plaintiffs, with costs to neither party.

SHENK, *J.*

We concur:

SCHAUER, *J.*

SPENCE, *J.*

MCCOMB, *J.*

Seven Up Bottling Co. v. Grocery Drivers Union. L. A. 23627.

DISSENTING OPINION OF TRAYNOR, *J.*
TO OPINION BY SHENK, *J.*

I dissent.

Because of the danger of conflict in the application of the Jurisdictional Strike Act with the National Labor Relations Board's application of the federal statute, and for the reasons set forth in my dissent in Garmon v. San Diego Bldg. Trades Council, I would reverse the entire judgment.

TRAYNOR, *J.*

We concur:

GIBSON, *C. J.*

CARTER, *J.*

APPENDIX "B".

Judgment.

Supreme Court of California.

Seven Up Bottling Company, etc. v. Grocery Drivers Union Local 848, etc. et al. L. A. 23627.

Thursday, January 16, 1958.

The judgment is reversed insofar as it awards injunctive relief, and affirmed insofar as it awards damages to the plaintiffs, with costs to neither party.

SHENK, *J.*

We concur:

SCHAUER, *J.*

SPENCE, *J.*

McCOMB, *J.*

Dissenting opinion by TRAYNOR, *J.*

We concur:

GIBSON, *C. J.*

CARTER, *J.*

APPENDIX "C".

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Three.

Seven Up Bottling Company of Los Angeles Incorporated, Plaintiff and Respondent, v. Grocery Drivers Union Local 848, a labor organization and an unincorporated association chartered by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, affiliated with the American Federation of Labor; Thomas L. Pitts, individually and as Secretary thereof; Joint Council of Teamsters No. 42, a labor organization and an unincorporated association; Ralph Clare, individually and as an officer and member thereof; International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, A.F.L.; Dave Beck, individually and as Executive Vice President and member thereof; Jack Annand, individually and as a member and representative thereof; Einar Mohn, individually and as a member and representative thereof; Ice Drivers, Helpers and Cold Storage Warehousemen Union Local No. 942, A. F. L., a labor organization and an unincorporated association; Irvin N. Gustafson, individually and as an officer and member thereof; Beer Drivers Union Local No. 203, A. F. L., a labor organization and an unincorporated association; George Leonard, individually and as an officer and member thereof; Steel, Paper House, Chemical Drivers & Helpers Union Local No. 578, A. F. L., a labor organization and an unincorporated association; John McGee, individually and as an officer and member thereof; Grocery Warehousemen Union Local 595, A. F. L., a labor organization and an unincorporated

association; L. L. Sylvaine, individually and as an officer and member thereof; Wholesale Salesmen Dairy and Frozen Food Union, Local No. 306, A. F. L., a labor organization and an unincorprated association; John G. Marshall, individually and as an officer and member thereof; Doe One to Doe One Hundred (inclusive of all intervening numbers as though each said Doe was severally and separately designated), Defendants and Appellants. Civil No. 20896.

Filed Sep. 18, 1956.

Appeal from a judgment of the Superior Court of Los Angeles County. A. Curtis Smith, Judge. Affirmed.

John C. Stevenson and Clarence Todd for Appellants.

Thomas P. Menzies, Harold L. Watt, Hill, Farrer & Burrill, and Carl M. Gould for Respondent.

Plaintiff sought to enjoin defendant Grocery Drivers Union Local 848 and several other defendants from (1) soliciting the Seven Up Employees' Association to breach the collective bargaining agreement between plaintiff and said association; (2) picketing places where 7-Up is sold; (3) requesting transportation companies to refuse to deliver merchandise to customers of plaintiff; (4) soliciting plaintiff to not recognize the Seven Up Employees' Association as the exclusive collective bargaining agency for plaintiff's employees; (5) inducing purchasers of 7-Up to refrain from doing business with plaintiff; (6) publicly asserting that plaintiff is unfair to organized labor. Plaintiff also sought to recover damages based upon such alleged activities of defendants. The theory of plaintiff was that there was a jurisdictional strike involving the claim on the part of defendants that plaintiff should recognize defendants Teamster Unions as the collective bar-

gaining agent of plaintiff's employees. Prior to the trial, the action was dismissed as to defendant Dave Beck. Judgment was in favor of plaintiff—injunction granted, and damages in amount of $4,000 awarded. Defendants appeal.

Appellants contend that the complaint does not state a cause of action under the Jurisdictional Strike Law.[1] They argue that the allegations of the complaint, with respect to a jurisdictional dispute, fail to show that any controversy existed between the Seven Up Employees' Association and the Teamsters Union as to which of them has or should have the exclusive right to represent plaintiff's employees in collective bargaining with plaintiff. They also assert that, in all cases involving interstate commerce, the federal government has preempted the

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[1]Section 115 of the Labor Code provides: "A jurisdictional strike as herein defined is hereby declared to be against the public policy of the State of California and is hereby declared to be unlawful."

Section 1118 of the Labor Code provides: "As used in this chapter, 'jurisdictional strike' means a concerted refusal to perform work for an employer or any other concerted interference with an employer's operation or business, arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to bargain collectively with an employer on behalf of his employees or any of them, or arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to have its members perform work for an employer."

Section 1117 of the Labor Code provides: "As used herein, 'labor organization' means any organization or any agency or employee representation committee or any local unit thereof in which employees participate, and exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, hours of employment or conditions of work, which labor organization is not found to be financed in whole or in part, interfered with, dominated or controlled by the employer.

"As used herein, 'person' means any person, association, organization, partnership, corporation, unincorporated association, or labor organization."

field which the Jurisdictional Strike Law attempts to control; and that the federal government has preempted the field of labor relations covered by the actions described in the pleadings.

There was a former appeal in this action (Seven Up etc. Co. v. Grocery etc. Union, 40 Cal. 2d 368 [254 P. 2d 544]). At the former trial, defendants' objection to the introduction of any evidence on the ground that the complaint did not state a cause of action was sustained and the trial court rendered judgment that plaintiff recover nothing. On the former appeal it was said at page 370: "The primary issue presented for decision in the court below and here is the validity of California's Jurisdictional Strike Law, *infra*. The court, in rendering its judgment, did not purport to pass upon anything but the sufficiency of the complaint." It was also said therein at page 372: "The jurisdictional strike is 'against the public policy' of the state and is 'unlawful.' (Id. § 1115) and any person suffering injury from a violation of the act is entitled to injunctive relief and damages. (Id. § 1116.)" It was also said therein at page 372: "There is no allegation showing that plaintiff was engaged in a business affecting interstate commerce and hence the Labor Management Relations Act of 1947, *supra*, has no application." It was also said therein at pages 372-373: "It should be clear that the activities of defendants, as alleged, fall within the terms of the act (Jurisdictional Strike Act). Defendants and the association are labor organizations and the latter is not financed, interfered with, dominated or controlled by plaintiff. There has been a concerted interference by defendants with plaintiff's-employer's business. That interference arises out of a controversy between two or more labor organi-

zations—defendants and the association—as to which of them should have the right to collectively bargain with plaintiff-employer." It was held on the former appeal that the Jurisdictional Strike Act (of California) is valid. The judgment therein, based upon the ruling that a cause of action was not stated, was reversed. Since the substance of the allegations of the complaint is shown in the opinion on the former appeal, the allegations will not be set forth herein. During the trial, involved on the present appeal, plaintiff dismissed certain portions of the complaint as follows: paragraph II of the third cause of action; and paragraphs II, IV, V, and VI of the fourth cause of action. The allegations of these paragraphs are to the effect that defendants, by their activities, are endeavoring to induce plaintiff to breach its agreement with the Seven Up Employees' Association, and are endeavoring to compel plaintiff to recognize defendants as bargaining agents when it would be unlawful, under sections 921-923 of the Labor Code, for plaintiff to do so. The complaint states a cause of action.

The trial court found that defendant unions (referred to in the findings as Teamster Unions) are labor organizations which exist for the purpose of dealing with employers concerning grievances, labor disputes, and wages; that each individual named as a defendant is an officer and agent of a certain defendant union; that plaintiff employs a number of persons in the production, bottling and distribution of beverages; on March 4, 1949, a written collective bargaining agreement was executed by the plaintiff and the Seven Up Employees' Association; said association is a labor organization in which employees participate, and it exists for the purpose of dealing with plaintiff concerning grievances, labor disputes, wages,

hours of employment and conditions of work; and said association is not financed in whole or in part, or interfered with, dominated or controlled by the plaintiff in any manner whatsoever; said agreement prescribes rates of pay, hours of employment and conditions of work for employees of plaintiff; said agreement was at all times and now is in full force and effect; defendants and their agents have been engaged in concerted interference with plaintiff's business; said concerted interference arises out of a controversy between defendant Grocery Drivers Union Local 848 and the Seven Up Employees' Association as to which of said labor organizations should have the exclusive right to bargain collectively with plaintiff on behalf of its non-supervisory production, bottling and distribution employees, and arises out of a controversy between said organizations as to which of them should have the exclusive right to have their members perform production, bottling and distribution work for plaintiff; the defendant labor organizations and the Seven Up Employees' Association are labor organizations as defined in section 1117 of the Labor Code, and said organizations are not found to be financed in whole or in part, interfered with, dominated or controlled by plaintiff, or by any of plaintiff's officers or agents, either in their organization or operation; plaintiff has no dispute or controversy of any kind with any of its employees; the effect of the unlawful activities, resulting in a refusal of retail markets to purchase and sell beverages produced and distributed by plaintiff, has been to impede the operation of plaintiff; plaintiff has been injured by the activities of defendants and is threatened with further injury by defendants, and this is a proper case for injunctive relief; said actions of defendants, particularly said labor organi-

zations and their agents, are in violation of sections 1115 to 1120 inclusive of the Labor Code; plaintiff has been damaged in the sum of $4,000.

Appellants assert in effect that the plaintiff was not entitled to rely on the Jurisdictional Strike Law as a basis for an injunction and damages. They argue that plaintiff interfered with the affairs of the Seven Up Employees' Association, and that such interference removed that association from the classification of a "labor organization," as defined in section 1117 of the Labor Code. That section states that a "'labor organization' means any organization . . . in which employees participate, and exists for the purpose . . . of dealing with employers . . . which labor organization is not found to be financed in whole or in part, interfered with, dominated or controlled by the employers." Appellants also argue that the court did not find on the issue as to whether the Seven Up Employees' Association was financed, interfered with, or controlled by plaintiff; that said issue is jurisdictional; and until there is a conclusive showing by findings of fact that the association was not financed in whole or in part, interfered with, dominated or controlled by plaintiff, the court has no jurisdiction of the action. They argue further that the finding that the defendant labor organizations and said association "are not found" to be financed or interfered with by plaintiff is not a valid finding—it is not a finding that they were not financed or interfered with—but it is a negative legal conclusion which leaves the record with no finding on the subject of interference. That finding follows the language of section 1117 of the Labor Code wherein it is stated, "which labor organization is not found to be financed in whole or in part, interfered with, dominated or controlled by the employer."

In other words, the court has made a finding, in the words of the statute, that the association is not found to be financed or interfered with by the plaintiff (employer). Also, it is to be noted that the court did find (at another place in the findings) that the association was not financed in whole or in part, or interfered with, dominated or controlled by the plaintiff. This is finding V which states that the allegations of paragraph VI [of the first cause of action] of the complaint are true. One of the allegations therein is: ". . . said labor organization [Seven Up Employees' Association] is not financed, in whole or in part, or interfered with, dominated or controlled by the plaintiff employer in any manner whatsoever.") In view of those two findings, it is clear that, contrary to appellants' argument, the court did find on the issue as to whether the association was financed or interfered with by plaintiff.

Appellants assert further that a finding that a labor organization is "not interfered with" is a legal conclusion, and that the court should have made findings with respect to specific acts on the part of plaintiff, so that a determination could be made from a consideration of the acts whether plaintiff interfered with the association. The court made findings as to ultimate facts. It was not required to make findings as to various evidentiary matters. In Petersen v. Murphy, 59 Cal. App. 528 [139 P. 2d 49], it was said at page 534: "[S]pecial facts need not be detailed in the findings if a general finding necessarily embodies an implied finding on such special facts." Some of the evidence presented by appellants, with reference to such alleged specific acts on the part of plaintiff, was as follows: that plaintiff spied on the activities of the company union (association) and the teamster union;

that plaintiff induced new employees (before and at the time they were employed) to sign a wage deduction authorization or card[2] by which the employee directed that dues in the company association be deducted from his wages each month and turned over to the association, and the association had no other application forms for membership; that plaintiff deducted all such dues and remitted them to the association, together with a list of the new employees paying such dues; that plaintiff maintained control of the official positions in the association "because of an association by-law that no employee could be a candidate for association office" unless he had been an employee for one year; that plaintiff maintained control of the association officers by an arrangement with the association that when the officers were discharged by plaintiff their removal from office in the association was automatic; that plaintiff removed the vice-president of the association while he was a negotiator in negotiations which were in progress; that plaintiff discharged an employee (White) for protesting the discharge of the vice-president; that the association had no procedure for expulsion or suspension of a member, and the association officers did not know who the new members were until they received the dues-deduction check from plaintiff at the end of each month; that the contracts between the

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[2]"Gentlemen:

You are authorized to deduct from my pay or salary thirty (30) days from date below, the sum of $3.00, and then you are authorized to deduct from my pay or salary each and every month thereafter the sum of $1.00. All monies deducted under this authorization are to be forwarded to the Secretary-Treasurer of the Seven Up Employees Association.

DATED: This ..... day of ....., 1948

Signed .....

Witness ....."

association and the company were never discussed at length in association meetings, and every president of the association who remained in the employment of the company was made a supervisor after he had served in one of the contract sessions.

The evidence presented by appellants with reference to those alleged matters was in conflict with evidence presented by plaintiff with reference thereto. Some of such evidence presented by plaintiff was as follows: the company association was formed in 1940 by the employees at their own instance without the knowledge of the company; the meetings of the association have been held off the premises of plaintiff; the officials of plaintiff first knew of the existence of the association when the association requested plaintiff to recognize it; plaintiff had nothing to do with the preparation of the constitution or by-laws or the amendments thereto; the association issued membership cards and maintained membership rolls; plaintiff never contributed any money to the association; dues-deduction cards and membership cards are printed and paid for by the association; meetings of the association are not attended by officers or supervisors of plaintiff; no official or supervisor of plaintiff has had anything to do with the administration of the affairs of the association; plaintiff has not expressed to any employee any preference in favor of any union or any opposition to any union; plaintiff had nothing to do with spying or attempted spying on the teamsters union; there was no discriminatory practice by plaintiff, based on union activities, with reference to employing or discharging employees. Many witnesses testified that there was no such discriminatory practice by plaintiff. An offer of proof was made by plaintiff and accepted by appellants that 32 witnesses

would testify that there was no such discriminatory practice by plaintiff, that there was no spying by plaintiff, that there was no opposition by plaintiff to the teamster union, and that at various meetings of the association various members spoke up in the same manner as White and others had spoken, and such employees were not discharged.

The reporters' transcript consists of 3,781 pages. It is not necessary to state the details of the testimony. The question as to whether plaintiff interfered with the company union or the defendant unions was a question of fact for the determination of the trial judge. The above general references to the testimony are sufficient to show that there was substantial evidence in support of the finding that plaintiff did not interfere with the association or the defendant unions.

Appellants also contend that the finding to the effect that there was a jurisdictional dispute, between the company association and the defendant unions as to which of them should represent the employees of plaintiff, is unsupported by the evidence. They assert that the teamster unions were in "a dispute over company [plaintiff] violations of every principle of our Labor Code"—that the picketing or activity of the teamsters in 1949 was conducted solely as a protest against discharges, spying and discrimination by plaintiff against employees who were favorable to the teamsters' union; that it was a typical "unfair labor practice" protest, which had no relation to a controversy over representation. They also argue that there was no evidence that anyone asserted on behalf of defendant unions that the defendant unions claimed the right to represent plaintiff's employees; and that on the contrary there was testimony that the defendants did not

assert that they claimed the right to represent plaintiff's employees. The Seven Up Employees' Association is a labor organization and it has had a collective bargaining agreement with plaintiff since 1940 which requires plaintiff to recognize it as said association's exclusive bargaining agent. There was evidence (testimony of a witness on behalf of defendants, and stipulations) that the picketing and boycotting was for the purpose of adversely affecting plaintiff's business so that plaintiff would make a contract with defendant unions whereby those unions would be the bargaining agents of plaintiff's employees. There was evidence (testimony of a witness on behalf of defendants, and stipulations) to the effect that picketing, boycotting, and listing as unfair by defendant unions cease when a company makes a bargaining contract with defendant unions. There was no controversy between plaintiff and its employees. In order to prove that a jurisdictional dispute existed, it is not necessary to prove that someone on behalf of the defendant unions stated that the unions claimed the right to represent plaintiff's employees. It was stipulated that the appellants were engaged in concerted activity involving plaintiff. The court found, upon substantial evidence, that appellants have been engaged in concerted interference with plaintiff's business and that such interference arises out of a controversy between defendant Grocery Drivers Union Local 848 and the company association as to which of them should have the exclusive right to bargain with plaintiff. There was substantial evidence in support of the finding to the effect that there was a jurisdictional dispute.

Appellants assert further that the court erred in denying their motion to amend their answer to allege that plaintiff

operates under a franchise granted by the Seven Up Company of St. Louis, Missouri, which gives plaintiff exclusive right to make and distribute 7-Up in the Los Angeles area; that the syrup and extract necessary to manufacture 7-Up is shipped from St. Louis; and that exclusive jurisdiction over the acts alleged in the complaint is in the National Labor Relations Board. Appellants stated that under the amendment they desired to raise the issue of interstate commerce and to submit evidence showing exclusive jurisdiction in federal agencies. The motion to amend was made more than four years after the complaint was filed, and of course was made after the first appeal in this case.

In Sommer v. Metal Trades Council, 40 Cal. 2d 392 [254 P. 2d 559], the defendant unions demanded that plaintiff recognize them as the bargaining representative of plaintiff's employees. At that time the employees were not organized. A few months later the employees formed an association or union and demanded that plaintiff recognize it as their bargaining representative. Plaintiff refused to recognize either of them. Defendant unions commenced picketing and boycotting, which interfered with plaintiff's business. The employees' union filed a petition with the National Labor Relations Board for certification as a representative for collective bargaining purposes. Defendant unions intervened and contested for recognition. The Board found that plaintiff was engaged in commerce within the meaning of the federal labor relations law and ordered an election. An election was conducted which resulted in favor of the employees' union, but it did not appear whether certification followed. Defendant unions continued their concerted activity, and plaintiff obtained an injunction. Plaintiff contended on appeal that the

activity of defendants constituted a jurisdictional strike in violation of the Jurisdictional Strike Act of which the state court had jurisdiction. The defendants contended that their activity was not in violation of that act and in any event was governable solely pursuant to federal law. The court said at page 396 that it may be assumed that evidence before the National Labor Relations Board bears on the issues before the court, "[b]ut it does not follow that the state court does not have jurisdiction of this controversy." It was also said at pages 399-400: "[T]he factors of protection and condemnation under the federal act largely determine whether the area is one closed to state control. The decisions indicate that the presence of those factors are deemed to disclose an intention on the part of Congress to place exclusive jurisdiction in the National Board. They also demonstrate that the problem is not one which in every case is resolved solely by looking to the provisions of the federal act; but that if the subject matter of the local statute is otherwise one within the area of permissible exercise of state power in the maintenance of industrial peace, and state policy is consistent with federal policy, the state does not necessarily encroach upon the area of control vested in the National Board." It was also said at pages 400-401: "If the union activity here involved is not protected under the federal act it is not immunized from state action. The union concerted activity was not protected under the federal act if another union was certified by the national board as the collective bargaining representative of the plaintiff's employees. And in the absence of such certification there is no immunity under the state law if the employees' Local constitutes a collective bargaining representative within the meaning of the jurisdictional strike

provisions. [Citation.] Since the certification of a union other than the defendant is not shown, a case of condemnation of the union activity under the federal act is not presented. And as it does not appear that the National Board has seen fit to act finally in either the representation or the unfair charges proceedings there is involved a possible area of activity which is neither protected nor condemned under the federal act, and pursuant to the foregoing decisions is subject to state action under the anti-jurisdictional strike provisions of the Labor Code. Thus, there is here an area open to the state for the exercise of its police power." The order granting the injunction was affirmed. In the present case none of the unions involved had been certified as the representative of plaintiff's employees. The trial court in the present case did not err in denying defendants' motion to amend.

Appellants contend further that the injunction exceeds the jurisdiction of the court. They argue that the injunction is not limited to the alleged controversy over representation, and that it blankets the activities of the unions as to free speech and other constitutional rights regardless of whether the activities relate to the matter of representation. The injunction provides in substance that defendants refrain from: preventing plaintiff from securing, selling or delivering merchandise; inducing any person or customer to refrain from using, transporting or selling any of plaintiff's products; representing to any person that plaintiff's employees are unorganized or that plaintiff's products are made by nonunion labor or that plaintiff is unfair to organized labor; maintaining plaintiff on any "we do not patronize" list; taking part in any interference with the business of any person for the purpose of inducing the person to cease handling or selling plaintiff's

merchandise; serving consumer, who requests plaintiff's beverage, a substitute beverage; interfering with plaintiff's business; intimidating or interfering with any employee of plaintiff. The matter of free speech with respect to the claim of unconstitutionality of the Jurisdictional Strike Act is discussed in the opinion of the former appeal. (Seven Up etc. Co. v. Grocery etc. Union, *supra*, 40 Cal. 2d 368, 373-380 [254 P. 2d 544].) Also, in the opinion on the former appeal (p. 380) there is a quotation, with respect to the breadth of a restraining order, which is applicable here. It was there stated, in part: "They contend that its language prohibits inducement not only of employees of Deltorto but also the inducement of employees of any other employer to strike, where the object thereof is to force Giorgi or any other employer or person to cease doing business with Langer. To confine the order solely to secondary pressure through Giorgi or Deltorto would leave Langer and other employers who do business with him exposed to the same type of pressure through other comparable channels. . . . 'When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed.'" This contention of appellants is not sustainable.

Appellants also contend that there was no evidence to sustain the judgment as to many defendants. They named several defendants who, according to appellants' argument, were unconnected with the case. There is evidence (including stipulations) from which it could be concluded that the defendants participated in the concerted interference with plaintiff's business. There was evidence that appellant Joint Council of Teamsters No. 42 constitutes

a co-ordinating body with which all teamsters local unions are affiliated, and that said council approved the picketing, boycotting and unfair listing of plaintiff. There were stipulations on behalf of defendants to the effect that the intention of defendants, unless restrained, was to continue to picket plaintiff. This contention is not sustainable.

By reason of the above conclusions, it is not necessary to discuss other points on appeal.

The judgment is affirmed.

WOOD, *J.*

We concur.

SHINN, *P. J.*

VALLÉE, *J.*

APPENDIX "D".

Judgment.

PERMANENT INJUNCTION, DAMAGES, AND COSTS.

In the Superior Court of the State of California, in and for the County of Los Angeles.

Seven Up Bottling Company of Los Angeles Incorporated, Plaintiff, vs. Grocery Drivers Union Local 848, a labor organization and an unincorpated association chartered by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, affiliated with the American Federation of Labor; Thomas L. Pitts, individually and as Secretary thereof; Joint Council of Teamsters No. 42, a labor organization and an unincorporated association; Ralph Clare, individually and as an officer and member thereof; International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, A.F.L.; Dave Beck, individually and as Executive Vice President and member thereof; Jack Annand, individually and as a member and representative thereof; Einar Mohn, individually and as a member and representative thereof; Ice Drivers, Helpers and Cold Storage Warehousemen Union Local No. 942, A.F.L., a labor organization and as unincorporated association; Irvin N. Gustafson, individually and as an officer and member thereof; Beer Drivers Union Local No. 203, A.F.L., a labor organization and an unincorporated association; George Leonard, individually and as an officer and member thereof; Steel, Paper House, Chemical Drivers & Helpers Union Local No. 578, A.F.L., a labor organization and an unincorporated association; John McGee, individually and as an officer and member thereof; Grocery Warehousemen Union Local 595, A.F.L., a labor

organization and an unincorporated association; L. L. Sylvaine, individually and as an officer and member thereof; Wholesale Salesmen Dairy and Frozen Food Union, Local No. 306, A.F.L., a labor organization and an unincorporated association; John G. Marshall, individually and as an officer and member thereof; Doe One Association to Doe Fifty Association (inclusive of all intervening numbers as though each said association was severally and separately designated, each an unincorporated association); Doe One to Doe One Hundred (inclusive of all intervening numbers as though each said Doe was severally and separately designated); Doe One Corporation to Doe Twenty Corporation (inclusive of all intervening numbers as though each said corporation was severally and separately designated), Defendants. No. 561,732.

Filed: Sep. 17, 1954.

This cause came on regularly for trial before the court sitting without a jury, Thomas P. Menzies, Harold L. Watt and Hill, Farrer & Burrill, by Thomas P. Menzies and Carl M. Gould, appearing as counsel for the plaintiff, and John C. Stevenson and Clarence E. Todd, appearing as counsel for the defendants, and the court having heard the testimony and having examined the proofs offered by the respective parties, and the evidence being closed, and the said cause having been argued to the court both as to the facts and law by the respective counsel for the parties, and briefs having been filed, the cause was submitted to the court for consideration and decision and, after due deliberation thereon, and the court being fully advised in the premises, the court filed its finding and decision in writing and ordered that judgment be entered herein in accordance therewith in favor

of plaintiff and, having made and filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith, NOW, THEREFORE, by reason of the law and findings aforesaid,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendants, and each of them, their officers, agents, servants, representatives, members, employees, attorneys, pickets, confederates, and each of them, and all persons acting directly or indirectly, by, through or in concert with said defendants, and all persons aiding, abetting and assisting or acting in aid of or in concert with said defendants, and each of them, ARE HEREBY PERPETUALLY AND FOREVER RESTRAINED AND ENJOINED and commanded to cease and desist and to forever refrain from doing or attempting or threatening to do or causing to be done, in concert, individually or collectively, jointly or severally, either directly or indirectly, by any means, method or device whatsoever, any of the following acts:

1. In any manner preventing or delaying plaintiff from securing merchandise or materials of any kind or character whatsoever or making delivery or sales of any merchandise.

2. Inducing any person, firm, corporation or association to refrain from using, handling, transporting, working with, advertising, promoting, displaying, stocking, serving or selling any product made or distributed by plaintiff.

3. Inducing any customer or prospective customer, or any person, firm, corporation or association, not to buy plaintiff's products, or to cease using, purchasing, stocking, handling, receiving, advertising, promoting, displaying, serving or selling plaintiff's products. Inducing any person to delay delivery or sale of plaintiff's products any place.

4. Representing in any manner to any person, firm, corporation or association that plaintiff's employees are unorganized or that plaintiff's products are made by non-union labor, or that plaintiff is unfair to organized labor or to any of the defendant labor organizations. Maintaining plaintiff on any "we do not patronize" or "unfair" list, and defendants shall forthwith cause plaintiff's name to be removed from any so-called "we do not patronize" or "unfair" list.

5. Instituting or taking part in any interference with the business of any customer or prospective customer of plaintiff, or any person, firm, corporation or association, for the purpose of inducing said customer or person, firm or corporation, or their employees, to cease handling, stocking, serving, advertising, promoting, displaying, purchasing or selling or maintaining a stock of plaintiff's merchandise, or to delay the receipt or sale of plaintiff's products.

6. Serving a consumer who requests, desires or expects plaintiff's beverage, a substitute beverage instead and in place of plaintiff's product.

7. Interfering in any manner whatsoever with the business of plaintiff.

8. Diverting any business from plaintiff in any manner whatsoever.

9. In any manner threatening, molesting, assaulting, harassing, coercing, impeding, annoying, intimidating or interfering with any employee of plaintiff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff do have and recover from the defendants the sum of $4,000.00, together with plaintiff's costs and

disbursements incurred herein, and the Clerk is ordered to enter as a part of this judgment said costs and disbursements taxed in the sum of $11,023.32.

DONE IN OPEN COURT this 17th day of September, 1954.

A. CURTIS SMITH
Judge of the Superior Court

APPENDIX "E"..

Findings of Fact and Conclusions of Law.

In the Superior Court of the State of California, in and for the County of Los Angeles.

Seven Up Bottling Company of Los Angeles Incorporated, Plaintiff, vs. Grocery Drivers Union Local 848, a labor organization and an unincorporated association chartered by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, affiliated with the American Federation of Labor; Thomas L. Pitts, individually and as Secretary thereof; Joint Council of Teamsters No. 42, a labor organization and an unincorporated association; Ralph Clare, individually and as an officer and member thereof; International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, A.F.L.; Dave Beck, individually and as Executive Vice President and member thereof; Jack Annand, individually and as a member and representative thereof; Einar Mohn, individually and as a member and representative thereof; Ice Drivers, Helpers and Cold Storage Warehousemen Union Local No. 942, A.F.L., a labor organization and an unincorporated association; Irvin N. Gustafson, individually and as an officer and member thereof; Beer Drivers Union Local No. 203, A.F.L., a labor organization and an unincorporated association; George Leonard, individually and as an officer and member thereof; Steel, Paper House, Chemical Drivers & Helpers Union Local No. 578, A.F.L., a labor organization and an unincorporated association; John McGee, individually and as an officer and member thereof; Grocery Warehousemen Union Local 595; A.F.L., a labor organization and an unincorporated association; L. L.

Sylvaine, individually and as an officer and member thereof; Wholesale Salesmen Dairy and Frozen Food Union, Local No. 306, A.F.L., a labor organization and an unincorporated association; John G. Marshall, individually and as an officer and member thereof; Doe One Association to Doe Fifty Association (inclusive of all intervening numbers as though each said association was severally and separately designated, each an unincorporated association); Doe One to Doe One Hundred (inclusive of all intervening numbers as though each said Doe was severally and separately designated); Doe One Corporation to Doe Twenty Corporation (inclusive of all intervening numbers as though each said corporation was severally and separately designated), Defendants. No. 561,-732.

This cause came on regularly to be heard before the Honorable A. Curtis Smith, Judge of the above-entitled court, sitting without a jury, Thomas P. Menzies and Harold L. Watt by Thomas P. Menzies, and Hill, Farrer & Burrill by Carl M. Gould, appearing for the plaintiff, and John C. Stevenson and Clarence E. Todd appearing for all defendants, and the parties hereto having offered both oral and documentary evidence and the arguments of counsel having been heard upon the conclusion of trial, thereupon the cause was submitted and the Court, having fully considered all of the evidence, now makes Findings of Fact and Conclusions of Law, as follows:

Findings of Fact.

I.

The court finds that the allegations contained in paragraph I of plaintiff's complaint are true.

II.

The court finds that the allegations contained in paragraph II of plaintiff's complaint are true.

III.

The court finds that the allegations contained in paragraph III of plaintiff's complaint are true.

IV.

The court finds that the allegations contained in paragraph V of plaintiff's complaint are true.

V.

The court finds that the allegations contained in paragraph VI of plaintiff's complaint are true.

VI.

The court finds that the defendants and their agents, servants and representatives have been engaged in concerted interference with the plaintiff's business and have received assistance in said activities from various American Federation of Labor Unions and Councils.

VII.

The court finds that the concerted interference with the plaintiff's business, as herein found, arises out of a controversy between the defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and its Grocery Drivers Union Local 848 and the Seven Up Employees' Association as to which of said labor organizations should have the exclusive right to bargain collectively with plaintiff on behalf of its non-supervisory production, bottling and distribution employees, or any of them, and arises out of a controversy between the aforesaid labor organizations as to which of them should have the exclusive right to have their members perform production, bottling and distribution work for plaintiff.

VIII.

The defendant labor organizations and the Seven Up Employees' Association are labor organizations as defined in Section 1117 of the Labor Code of the State of California, and the said labor organizations are not found to be financed, in whole or in part, interfered with, dominated or controlled by the plaintiff or by any of plaintiff's officers or agents, either in their organization or operation in any manner whatsoever.

IX.

The court finds that the allegations contained in paragraph IX of plaintiff's complaint are true.

X.

The court finds that the allegations contained in paragraph X of plaintiff's complaint are true.

XI.

The court finds that the plaintiff has been injured by the activities of the defendants and is threatened with further injury by the defendants, and the court finds that this is a proper case for injunctive relief and that plaintiff is entitled to such injunctive relief.

The court now makes its Findings of Fact as to plaintiff's second cause of action:

I.

The court finds that the allegations contained in paragraph II of plaintiff's second cause of action are true.

II.

The court finds that plaintiff has been damaged in the sum of $4,000.00.

CONCLUSIONS OF LAW.

I.

That the plaintiff has been damaged in the sum of $4,000.00.

II.

That plaintiff is entitled to a permanent injunction restraining the defendants from interfering with plaintiff's business in any manner whatsoever.

III.

That the plaintiff have and recover its costs and disbursements herein incurred.

DATED this 17th day of September, 1954.

A. CURTIS SMITH
Judge

APPENDIX "F".

In the Supreme Court of the State of California

SEVEN UP BOTTLING COMPANY OF LOS ANGELES INCORPORATED,

Plaintiff and Respondent,

vs.

GROCERY DRIVERS UNION LOCAL 848, a labor organization and an unincorporated association chartered by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, affiliated with the American Federation of Labor; THOMAS L. PITTS, individually and as Secretary thereof; JOINT COUNCIL OF TEAMSTERS NO. 42, a labor organization and an unincorporated association; RALPH CLARE, individually and as an officer and member thereof; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, A.F.L.; DAVE BECK, individually and as Executive Vice President and member thereof; JACK ANNAND, individually and as a member and representative thereof; EINAR MOHN, individually and as a member and representative thereof; ICE DRIVERS, HELPERS AND COLD STORAGE WAREHOUSEMEN UNION LOCAL NO. 942, A.F.L., a labor organization and an unincorporated association; IRVIN N. GUSTAFSON, individually and as an officer and member thereof; BEER DRIVERS UNION LOCAL NO. 203, A.F.L., a labor organization and an unincorporated association; GEORGE LEONARD, individually and as an officer and member thereof; STEEL, PAPER HOUSE, CHEMICAL DRIVERS & HELPERS UNION LOCAL NO. 578, A.F.L., a labor organization and an unincorporated association; JOHN McGEE, individually and as an officer and member thereof; GROCERY WAREHOUSEMEN UNION LOCAL 595, A.F.L., a labor organization and an unincorporated association; L. L. SYLVAINE, individually and as an officer and member thereof; WHOLESALE SALESMEN DAIRY AND FROZEN FOOD UNION, LOCAL NO. 306, A.F.L., a labor organization and an unincorporated association; JOHN G. MARSHALL, individually and as an officer and member thereof; DOE ONE to DOE ONE HUNDRED (inclusive of all intervening numbers as though each said Doe was severally and separately designated),

Defendants and Appellants.

APPELLANTS' PETITION FOR REHEARING.

To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Summary of Grounds for Rehearing.

We respectfully petition this Honorable Court for rehearing in the above entitled action on the ground that such rehearing is necessary:

(1) Because appellants have had no previous opportunity to brief or argue the basis of this Court's majority decision, *i.e.* the judicial pronouncement of far reaching and new limitations upon traditional trade union activities which heretofore had been judicially approved for fifty years in this state. (Dissent in *Garmon v. San Diego Bldg. Trades Union*, folio page 10, decided concurrently with this case and treated as controlling the appeal in this case.)

(2) The failure of the Court to observe that the facts in this case (as found below and accepted by this Court on appeal) completely remove it from the new pronouncements set forth in the *Garmon* case.

(3) The complete failure of the Court to consider, rule upon or *even mention* in its opinion the issue raised by appellants at every stage of this proceeding that the so-called rival union was and is company assisted and interfered with and for this reason a dispute with it is removed from the provisions of the Jurisdictional Strike Act. (Labor Code, Sec. 1117.)

(4) The error of the Court in failing to decide (or even to consider this aspect of the preemption question although it was raised at all stages of the proceeding) that the National Labor Relations Board has *exclusive jurisdiction to determine what labor organizations in interstate industries are bona fide* and for this reason the State courts lack jurisdiction to award damages premised upon their assumption of concurrent jurisdiction of this subject.

(5) The failure of the Court in its decision and in its minute order to clearly indicate whether the case is remanded to the trial court for the purpose of taking further evidence and making further findings or whether the judgment below has been reversed outright as to the injunction and affirmed as to the damage award.

ARGUMENT.

Lack of Opportunity to Be Heard.

The *Garmon case* (77 S. Ct. 607) was remanded to this Court by the United States Supreme Court for a determination as to whether this Court intended to award damages for a violation of *state* law, as distinct from federal law, arising from peaceful picketing by a minority union for a union-shop contract. The parties to the present case were asked to and did file supplemental memoranda and to reargue this aspect of the case along with the *Garmon* argument on remand. In both cases it was assumed by the Court and counsel that the question presented was the allowable *jurisdiction* of state courts to award damages under *United Construction Workers v. Laburnum*, 347 U. S. 656, 98 L. Ed. 1025, where the conduct involved was preempted against state court relief by injunction. There was no hint that this Court was considering a complete revision of the public policy of the state and the reversal of precedents which had stood for fifty years and been treated by the bench and bar as controlling law. Indeed, on the very day of decision of the original *Garmon* case, this Court in the companion case of *Charles H. Benton, Inc. v. Painters Union*, 45 Cal. 2d 677, 681, reaffirmed the proposition, long established in this state, that peaceful organizational or recognitional picketing was an allowable form of lawful union activity.

Under these circumstances, elementary justice requires the Court to *rehear* this aspect of the *Garmon* case since there has been no *hearing* heretofore afforded the parties despite the importance of the subject matter in the entire field of labor-management relations. This is particularly true as to the present case because it has been (erroneously,

we claim, as shown below) treated as controlled by *Garmon*.

If the reinterpretation these many years later of Labor Code Section 923 does not amount to judicial legislation, at the very least, it is a form of judicial surgery performed upon preexisting employee and union rights which should not be undertaken until the persons affected have at least been heard.

The majority opinion says that the applicable law policy of California in this controversial field is now "in all essential respects the same as that declared by the legislatures of Maine and Wisconsin." (Folio opinion, p. 33.) Should not the parties have an opportunity to explore the labor policies of these two states to determine whether they are or have been consonant with the policies of this State? To take one example, the State of Wisconsin has a State Labor Relations Act which affords *judicial* protection to workers against employer interference with their organizational and collective bargaining activities. (Wisc. Stat., 1957, Sec. 111.06, *et seq.*) There is no counterpart in California. Indeed, nowhere in the present *Garmon* decision of this Court is there any hint that Section 923 will be broadened in interpretation so as to afford such counterbalancing protections for the peaceful economic pressures which have been taken away from working people who desire effective union representation.

We respectfully urge the Court to afford *all* parties an opportunity to be *heard* before the public policy of this state on this important subject is summarily changed and the changes given retroactive effect by damage awards.

This Case Is Not Controlled by the Garmon Decision.

In *Garmon* the majority found that Congress preempted injunctive relief, but not state court damage awards, primarily upon the ground that the federal law provided no relief by way of damages for the conduct shown in evidence there, *i.e.* primary picketing in support of a union-shop demand by a minority union. But Congress *has* created substantive and procedural rights to private damage actions *applicable to the entire conduct* of the unions *in this case*. This was pointed out in our supplemental memorandum to this court at pages 6 through 8. This court expressly found that the defendant unions here have *solely* engaged in *secondary* picketing and boycotting of the customers of plaintiff. (Folio opinion, pp. 1 and 2.) On their face, the findings of this Court spell out conduct which is completely within the area covered by the *damage* sections of the Taft-Hartley Act. (Secs. 303(a)(1) and (2) and 303(b).) In fact, the Court in its footnote at page 20 of the decision in this case takes note of these very sections.

This point is more clear when we remember that the Federal Act (Sec. 303) specifically cedes jurisdiction to the state courts in such damage actions. That very fact establishes preemption in the Federal courts for the reason that state courts in trying such cases must be governed entirely by Federal law. At no time has the Congress authorized any state to establish its own rules, procedures, or tests in determining what does or does not constitute a secondary boycott for purposes of damages. In the case at bar it is clear that the activity did not constitute a secondary boycott under Federal law. No employee was "induced or encouraged" to cease work, which is the basic

jurisdictional element of a secondary boycott under Federal law.

Therefore, the remaining activity which consisted of publication to the public of the conditions of a labor dispute, not only did not violate the secondary boycott provisions of the Federal Act but were protected activities of Section 7 of the Labor Management Relations Act. We cannot do better than to repeat here the quotation of the case of *Garner v. Teamsters Union,* which will be found in our supplemental brief to this court (p. 6):

> "The conflict lies in remedies, not rights, the same picketing may injure both public and private rights, but when two separate remedies are brought to bear on the same activity, a conflict is imminent. It must be remembered that petitioner's state remedy was a suit for injunction prohibiting the picketing. The Federal Board, if it should find a violation of the National Labor Management Relations Act, would issue a cease and desist order and perhaps obtain a temporary injunction to preserve the status quo. Or if it found no violation it would dismiss the complaint thereby sanctioning the picketing."

The court then adds:

> *"For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal act prohibits."* (Emphasis ours.)

> "This is precisely the situation in the case at bar. The United States Supreme Court in *Weber v. Anheuser-Busch, Inc., supra,* again emphasized the preemption of protected rights. The court said: 'The court has ruled that a state may not prohibit the exercise of rights which the Federal Acts protect.'

> Citing *Hill v. Florida, 235 U. S. 538,* and *International Union v. O'Brien, 339 U. S. 454,* the court adds: *'Where the conduct, if not prohibited by the Federal Act, may be reasonably deemed to come within the protection afforded by that Act the State court must decline jurisdiction in deference to the tribunal which Congress has selected for determining the issue in the first instance.'"* (Emphasis ours.)

Again we call attention to the fact that this element was nowhere present in the *Garmon* case upon which decision this court evidently relied in the case at bar. In short, regardless of the decision in the *Garmon* case, it has no bearing whatever upon the law or fact issues in the case at bar.

We are at a loss to explain why, on this state of the record and under the plain findings of the Court in its decision (which accords with the findings and evidence below), the Court majority deems this case controlled by *Garmon*—where no damages could be sought under federal law.

Applying this Court's rationale in *Garmon* to the facts of this case, the damage award must fall along with the injunction.

The Court Failed to Consider the Company Assistance and Interference Issues and the Pre-emption Aspect of These Issues.

Although the case at bar, consuming some six weeks of trial, was devoted entirely, with the exception of arguments on jurisdiction of the lower court, to the question of "interference, domination and financial assistance" to the company union, there is not a word or line in the decision of this court on this jurisdictional question. This point was argued extensively in our briefs to this Court (pp. 15-

19) as well as in our briefs to the District Court of Appeal. It is evident from the record that interference and financial assistance to the company union were conclusively established. It is more evident that if these matters were heard by the proper jurisdictional tribunal, namely, the Labor Management Relations Board and the Federal courts, applying their own standards of interference, as well as their own remedies under their patterns of law long established, they might—and we believe would—have reached an entirely different conclusion than that of the lower court and ordered the company union dissolved, in which case there would be no jurisdictional background whatever for an award of damages.

Be that as it may, the absence of any statement whatever in the decision rendered by this court as to the question of interference, domination or financial assistance leads inevitably to the conclusion that this court either ignored this question entirely in arriving at a decision or fell into the same error committed by the lower court in assuming to pass on a question which is solely under jurisdiction of the Labor Board and Federal courts. This is more apparent when we remember that the language and provisions of the jurisdictional strike act are copied almost verbatim from the Labor Management Relations Act wherein complete procedure is set forth for both prevention and remedy. This decision would nullify those provisions and substitute those of the state courts.

This could well lead to a conclusion by the state court that a union was *not* "interfered with" with an attending award of damages and a directly contrary decision by the Labor Board and Federal courts ordering the "company" union dissolved and affirming the *protected right* of the union to picket against it. (*Mastro Plastic v. N. L. R. B.*, 350 U. S. 270.)

We might remark that the opinion of this court did not even set forth whether such practices as those proved by uncontradicted evidence were "interferences" under *state* law although this is of no consequence in view of the lack of state court jurisdiction to hear and decide the matter at all. This point was argued in our briefs to this court (pp. 5-8; 14-21).

There was no such question in the *Garmon* case, either raised or proved, which completely distinguishes that case from the case at bar.

While it is our feeling that this court was in error in assuming that it could hear, regulate or control pre-empted activities coming under Labor Board jurisdiction and this accomplishes, but indirectly, what the court cannot do directly by the process of substituting an award for damages for an injunction, and while we also believe that the activity for which this court awarded damages was a protected right under the National Labor Relations Act which could neither be prohibited nor penalized by any state court, it is our view that these questions are secondary in the case at bar. There is no question whatever that the National Labor Relations Act specifically controls the matter of "interference, domination and financial assistance" as to all parties engaged in interstate commerce within the meaning of the Act and that this court, as well as the lower court, has usurped that jurisdiction and attempted to apply its own standards of conduct and law with respect to these matters.

Both this court and the lower court ignored completely the question of whether the activities for which damages were awarded were "protected rights" under Section 7 of the National Labor Relations Act. It must now be clear to the court from the decision of the United States Supreme

Court that this question is under exclusive jurisdiction of the Labor Board and the Federal courts both as to procedure and law. (*Mastro Plastic v. N. L. R. B., supra.*)

Confusion as to the Courts Ultimate Disposition of the Case.

Finally, appellants are confused as to the decision. The decision states that the lower court is reversed on the matter of injunction with some language indicating that appellants should have been given the opportunity to establish interstate commerce. The reversal indicates to us that this court assumed that interstate commerce was sufficiently shown as a matter of law by the variety of Labor Board cases which we cited in our briefs, and the evidence as to the type of business in which Respondents were engaged as well as their failure to object in any manner when the lower court stated that "it would be assumed" that interstate commerce existed. We believe that this decision is final as it now stands and does not indicate an intention to remand the case for further proceedings. Appellants are anxious that this be clarified in order that there be no question as to the fact that this is a final judgment which would give us the necessary finality for appeal to the United States Supreme Court.

Each of the matters detailed herein were raised and argued extensively either in the lower court or in our briefs to the District Court of Appeal and to this court. The court failed entirely to rule upon the scope of the injunction issued. This question was argued in our brief to this court (pp. 21-23).

We urge that a rehearing be granted.

Respectfully submitted,

STEVENSON & HACKLER,

CLARENCE TODD,

Attorneys for Appellants.

APPENDIX "G".

Supreme Court of California.

Seven-Up Bottling Company of Los Angeles, Inc. v. Grocery Drivers Union Local 848, et al. L. A. 23627.

Thursday, February 13, 1958.

Appellants' petition for rehearing denied. Gibson, C. J., Carter, J. and Traynor, J. are of the opinion that the petition should be granted.

APPENDIX "H"

In the Supreme Court of the State of California.

Seven Up Bottling Company of Los Angeles, Incorporated, Plaintiff and Respondent, v. Grocery Drivers Union Local 848, a labor organization and an unincorporated association chartered by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, affiliated with the American Federation of Labor; Thomas L. Pitts, individually and as Secretary thereof; Joint Council of Teamsters No. 42, a labor organization and an unincorporated association; Ralph Clare, individually and as an officer and member thereof; International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, A.F.L.; Dave Beck, individually and as Executive Vice President and member thereof; Jack Annand, individually and as a member and representative thereof; Einar Mohn, individually and as a member and representative thereof; Ice Drivers, Helpers and Cold Storage Warehousemen Union Local No. 942, A.F.L., a labor organization and an unincorporated association; Irvin N. Gustafson, individually and as an officer and member thereof, Beer Drivers Union Local No. 203, A.F.L., a labor organization and an unincorporated association; George Leonard, individually and as an officer and member thereof; Steel, Paper House, Chemical Drivers & Helpers Union Local No. 578, A.F.L., a labor organization and an unincorporated association; John McGee, individually and as an officer and member thereof; Grocery Warehousemen Union Local No. 595, A.F.L., a labor organization and an unincorporated association; L. L. Sylvaine, individually and as an officer and member thereof; Wholesale Salesmen Dairy and Frozen Food Union, Local No. 306, A.F.L., a labor organization and an un-

incorporated association; John G. Marshall, individually and as an officer and member thereof, Defendants and Appellants. No. L. A. 23627.

Filed: May 7, 1958.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

I.

Notice is hereby given that Grocery Drivers Union Local 848, a labor organization and an unincorporated association chartered by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, affiliated with the American Federation of Labor; Thomas L. Pitts, individually and as Secretary thereof; Joint Council of Teamsters No. 42, a labor organization and an unincorporated association; Ralph Clare, individually and as an officer and member thereof; International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, A.F.L.; Dave Beck, individually and as Executive Vice President and member thereof; Jack Annand, individually and as a member and representative thereof; Einar Mohn, individually and as a member and representative thereof; Ice Drivers, Helpers and Cold Storage Warehousemen Union Local No. 942, A.F.L., a labor organization and an unincorporated association; Irvin N. Gustafson, individually and as an officer and member thereof; Beer Drivers Union Local No. 203, A.F.L., a labor organization and an unincorporated association: George Leonard, individually and as an officer and member thereof; Steel, Paper House, Chemical Drivers & Helpers Union Local No. 578, A.F.L., a labor organization and an unincorporated association; John McGee, individually and as an officer and member thereof;

Grocery Warehousemen Union Local 595, A.F.L., a labor organization and an unincorporated association; L. L. Sylvaine, individually and as an officer and member thereof; Wholesale Salesmen Dairy and Frozen Food Union Local No. 306, A.F.L., a labor organization and an unincorporated association; John G. Marshall, individually and as an officer and member thereof, defendants and appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of California, dated February 13, 1958, affirming the judgment of the Superior Court in and for the County of Los Angeles for damages and costs against defendants in the sum of $15,023.32 against appellants above named, based upon alleged violations of Sections 1115-20 of the Labor Code of California. Said judgment of the Superior Court was entered on September 22, 1954, in Book 2786, page 83. This appeal is taken pursuant to 28 U. S. C. 1257(2).

II.

The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

a. Clerk's transcript on appeal from the Superior Court of Los Angeles County.

b. Reporter's transcript of the testimony offered or taken, evidence offered and received, and all rulings, instructions, acts, or statements of the court; also all objections or exceptions of counsel, and all matters to which the same relate.

c. Opinion of the district court of appeal, dated September 18, 1956.

d. Majority and dissenting opinions of this Court filed January 16, 1958.

e. Minute order of California judgment of Supreme Court, dated January 16, 1958.

f. Appellants' petition for rehearing, dated January 31, 1958.

g. Order, dated February 13, 1958, denying petition for rehearing.

h. This Notice of Appeal to the Supreme Court of the United States filed on May 7, 1958.

i. Affidavit of service of this Notice of Appeal.

III.

The following questions are presented by this appeal:

1. Did the Supreme Court of California err in ruling that the California Jurisdictional Strikes Act (Sections 1115-20 of the Labor Code of California), in so far as it authorizes an award of damages only against a labor union, is not repugnant to the Labor Management Relations Act (29 U. S. C. Section 141, *et seq.*) when applied to peaceable picketing in a labor dispute affecting interstate commerce?

2. If the answer to question 1 is in the affirmative, did the Supreme Court of California err in affirming the ruling of the trial court refusing to permit the Union defendants to allege and prove that the labor dispute substantially affected interstate commerce as a defense to the claim for damages?

3. Did the Supreme Court of California err in ruling that it had jurisdiction to award damages against the Union defendants arising solely from peaceable, concerted

activities found by the California Court to be within the exclusive jurisdiction of the National Labor Relations Board with respect to injunctive relief?

4. Did the California Supreme Court exceed its jurisdiction in ruling that damages were recoverable against labor unions for violations of the state's Jurisdictional Strikes Act, *supra,* without regard to the affectation of interstate commerce and the provisions authorizing suits for damages against labor unions arising from jurisdictional disputes contained in Section 303(a)(4) and (b) of the Labor Management Relations Act, *supra?*

5. Did the California Supreme Court exceed its jurisdiction in ruling that damages were recoverable against labor unions for violation of the state's Jurisdictional Strikes Act, *supra,* arising from conduct which, upon proper pleading and proof, might be found to be within the damage provisions of Sections 303(a)(1) and (b) of the Labor Management Relations Act?

6. Did the application of the California Jurisdictional Strikes Act, *supra,* as a basis for granting damages infringe upon federally protected rights of appellants guaranteed under Section 7 of the Labor Management Relations Act (29 U. S. C. 157)?

7. Did the Supreme Court of California have jurisdiction to find, upon conflicting evidence, that the Seven Up Employees' Association was not "financed, in whole or in part, interfered with, dominated or controlled" by respondent company as required by the state's Jurisdictional Strikes Act, notwithstanding the provisions of Sections 8(a)(2) and 10(a) of the National Labor Relations Act (28 U. S. C. 158(a)(2) and 160(a) conferring jurisdiction upon the National Labor Relations Board to

determine the bona fides of labor organizations in interstate commerce?

Dated at Los Angeles, California, this 7th day of May, 1958.

STEVENSON & HACKLER
CLARENCE E. TODD
By: HERBERT M. ANSELL
Attorneys for Defendants and Appellants.

PROOF OF SERVICE

I, HERBERT M. ANSELL, an attorney in the office of Messrs. John C. Stevenson and Charles K. Hackler, attorneys of record for appellants named herein, depose and say that on the 7th day of May, 1958, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Seven Up Bottling Company of Los Angeles, Inc., appellee herein, by delivering the same to the receptionist in the offices of Carl M. Gould, located at 411 West Fifth Street, Los Angeles 13, California, and to the receptionist in the offices of Thomas P. Menzies, located at 458 South Spring Street, Los Angeles 13, California, both counsel of record for said Seven Up Bottling Company of Los Angeles, Inc.

HERBERT M. ANSELL

Subscribed and sworn to before me at Los Angeles, this 7th day of May, 1958.

W. NEAL WRITER,
Notary Public in and for the County of Los Angeles, State of California.
My Commission Expires July 16, 1961.

[SEAL]

APPENDIX "I".

Sections of the Taft-Hartley Act.

The relevant sections of the National Labor Relations Act, as amended, are herein set forth:

"Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"Section 8. (a) It shall be an unfair labor practice for an employer—

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against any employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

"Section 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

"(e) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

"Section 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . .

"Section 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods,

articles, materials, or commodities or to perform any services, where an object thereof is—

"(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.

"(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class. . . .

Section 303. (b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount of controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

APPENDIX "J".

Sections of Jurisdictional Strikes Act of California.

The California Jurisdictional Strikes Act (Sections 1115 to 1120 of the Labor Code of California) is herein set forth:

"Section 1115. Jurisdictional strike against public policy and unlawful. A jurisdictional strike as herein defined is hereby declared to be against the public policy of the State of California and is hereby declared to be unlawful.

"Section 1116. Right to injunctive relief and damages. Any person injured or threatened with injury by violation of any of the provisions hereof shall be entitled to injunctive relief therefrom in a proper case, and to recover any damages resulting therefrom in any court of competent jurisdiction.

"Section 1117. "Labor organization" and "person" defined. As used herein, "labor organization" means any organization or any agency or employee representation committee or any local unit thereof in which employees participate, and exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, hours of employment or conditions of work, which labor organization is not found to be financed in whole or in part, interfered with, dominated or controlled by the employer.

"As used herein, "person" means any person, association, organization, partnership, corporation, unincorporated association, or labor organization.

"Section 1118. "Jurisdictional strike" defined. As used in this chapter, "jurisdictional strike" means a concerted refusal to perform work for an employer or any other con-

certed interference with an employer's operation or business, arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to bargain collectively with an employer on behalf of his employees or any of them, or arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to have its members perform work for an employer.

"Section 1119. Rights are interfered with. Nothing in this chapter shall be construed to interfere with collective bargaining subject to the prohibitions herein set forth, nor to prohibit any individual voluntarily becoming or remaining a member of a labor organization, or from personally requesting any other individual to join a labor organization.

"Section 1120. Separability provision. If any provision of this chapter or the application of such provision to any person or circumstance shall be held invalid, the remainder of this chapter or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby."

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1958.
No. 169

GROCERY DRIVERS UNION LOCAL 848, etc., *et al.*,

Appellants,

vs.

SEVEN UP BOTTLING COMPANY OF LOS ANGELES, INCORPORATED,

Appellee.

On Appeal From the Supreme Court of the State of California.

MOTION TO DISMISS APPEAL.
and
BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL.

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IN THE

Supreme Court of the United States

October Term, 1958.

No. .....

GROCERY DRIVERS UNION LOCAL 848, etc., *et al.*,

Appellants,

vs.

SEVEN UP BOTTLING COMPANY OF LOS ANGELES, INCORPORATED,

Appellee.

MOTION TO DISMISS APPEAL.

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellees hereby move to dismiss the appeal from the judgment of the Supreme Court of the State of California on the following grounds:

(1) That this Court lacks jurisdiction of this case because the state court judgment is not final; it is not complete; and, it is not "ripe" for a decision;

(2) That the appeal is not timely insofar as raising the constitutionality of the state Jurisdictional Strikes Statutes by reason of the fact that the judgment of the California Supreme Court upholding the validity of those statutes was rendered in 1953 after

an appeal from the judgment of dismissal of such action based solely on the question of the validity of those statutes;

(3) That there is no substantial Federal question involved or presented; and,

(4) That the state court judgment rests on adequate and independent state grounds.

The appellants herein have chosen to appeal even though the proper manner of presenting this case to the Court is by petitioning for certiorari. Had the latter method been used, appellants would have been forced to disclose facts and issues which we are now compelled to expose herein and which facts and issues would have resulted in a refusal by this Court to grant certiorari. Thus, we are compelled to prepare and to present this Motion to Dismiss on the foregoing grounds which are dispositive of this case.

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BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL.

Restatement of This Case.

A. Question Presented.

The only question involved in this case is whether or not a state court has the power to remedy by *damages* conduct which constitutes a tort under state law when there has been no showing that interstate commerce is involved or affected and despite the fact that the problem involves activities by a labor union.

B. Proceedings in the Trial Court.

The findings of fact and conclusions of law [Clk. Tr. pp. 37-40] demonstrates that the trial court found that the appellants had engaged in concerted interference with the appellee's business, arising out of a controversy between two unions, one of whom with which appellee had a valid and bona fide collective bargaining contract and which union was not dominated by the appellee, as to which should have exclusive collective bargaining rights for appellee's employees.

Such findings and conclusions were based in part on evidence dating back to 1942 when the Independent Union filed a complaint in the Superior Court of the County of Los Angeles against appellants [Pltf. Ex. 31]. The court found there that appellants did, by *threats of force and violence,* engage in acts to coerce members of Independent Union to become members of appellants; that there were voiced threats of physical injury made by appellant Pitts at appellee's plant, and that there was an excessive number of pickets trailing trucks operated by members of Independent Union, and rude and boisterous conduct on the part of appellants herein.

The court also found there that these activities were for the purpose of coercing appellee's employees into abandoning their own independent union and into joining appellants and appointing appellants as their bargaining agent [Pltf. Ex. 31 (Findings)].

Independent Union and its members told their customers that they belonged to their own union and had a contract with appellee; that they wanted no part of appellants [Rep. Tr. pp. 1340, 1343].

Appellants assaulted an employee of appellee [Rep. Tr. p. 3354] and engaged in mass picketing [Rep. Tr. p. 3360] and unruly conduct [Rep. Tr. p. 3360]. Appellants offered inducements to employees to leave employment with respondent [Rep. Tr. pp. 3358, 3359] and engaged in harassing, trailing and intimidating employees of respondent [Rep. Tr. p. 3363].

Appellants admit that they commenced a campaign to organize appellee's employees [Rep. Tr. p. 132] and for that purpose picketed, boycotted and called a strike [Rep. Tr. p. 143].

Appellants knew that appellee's employees had their own union organization [Rep. Tr. p. 147].

Such concerted interference constitutes a tort under the California State Jurisdictional Strikes Act and the trial court determined that such conduct violated that Act.

Although the California Supreme Court stated that "truck drivers of suppliers, and some customers refused to cross the picket lines to make deliveries or respectively to make purchases" and such statement is adopted by appellants in their Jurisdictional Statement on page 4 under the heading, Statement of the Case, the trial court actually did not make such a finding; there was no evi-

dence introduced to support such a finding, and the only place it appeared in the record was in the allegations of appellee's complaint.

Furthermore, appellants on page 20 of their Jurisdictional Statement assert that "The State Supreme Court found that the Union engaged in peaceable picketing at retail outlets which carried the Company's product and that some customers and delivery personnel refused to make purchases and deliveries respectively. While the State Supreme Court might have stated that, the trial court in fact did not make such a finding.

Finally, the rationale of the trial court in deciding this case and in rejecting the appellant Union's offer of proof to show that the appellee's business affected interstate commerce was based not on the theory that it had "concurrent jurisdiction" with the National Labor Relations Board, as the California State Supreme Court misleadingly stated and appellants herein adopted on page 6 of their Jurisdictional Statement, but instead was that the activity complained of was neither protected nor prohibited by the Taft-Hartley Act, thereby making the issue of interstate commerce moot, and that such activity was a violation of California's Jurisdictional Strikes Act.

C. This Case Is Distinguishable From and Should Not Be Considered With the Garmon Decision.

First, of all, there is a difference in the basic facts involved in the two cases. Garmon involved an employer whose employees were unorganized by a Union, whereas this Seven Up case involves an employer whose employees have been organized by a Union since 1940.

Also, in *Garmon*, the facts showed that the employer came under the jurisdiction of the National Labor Rela-

tions Board and that the union was engaged in Federal unfair labor practices as defined in the Taft-Hartley Act, neither of which is true here.

Furthermore, in Seven Up—

(1) There have been collective bargaining contracts in effect between the Seven Up Company and a labor organization for more than eighteen years;

(2) The appellant unions sought to compel by coercive conduct and economic violence a breach of that existing contract and a substitution of themselves as representative of the employees;

(3) It is presently undecided as to whether or not the employer's operations affect interstate commerce; thus far the state court has *not* made such a determination; and,

(4) No final judgment except as to money damages has been entered in this Seven Up case.

Whereas, in the *Garmon* decision—

(1) No union represented the employees of the employer involved;

(2) No collective bargaining contract ever existed between the employer and any other labor organization;

(3) The unions in that case were engaged in organizational activities;

(4) The trial court found that interstate commerce was affected and the court determined that the employer was covered by the Federal Taft-Hartley Act; however, the National Labor Relations Board refused to exercise its statutory jurisdiction; and,

(5) This United States Supreme Court held that the Board had jurisdiction and that the state court was without power to grant *injunctive* relief (not damages) by applying the Federal statute.

Thus there is no "labor dispute" involved, in its traditional sense and meaning, in the Seven Up case where a Union has represented the employees of appellee for more than 18 years.

Moreover, the basis of the holdings in the two cases differ: in *Garmon*, the basis is the public policy of Labor Code Section 923 as judicially implemented and declared by the California Supreme Court in its own *Garmon* decision; whereas in this Seven Up case, the basis of the holding is the public policy of the State as expressed in the Jurisdictional Strike Statutes.

Significantly, the California Supreme Court, though referring in the Seven Up case to the *Garmon* decision, did not say that that decision actually controlled the Seven Up case.

For all of the above reasons, this Court should consider this case alone and independently of the *Garmon* decision.

ARGUMENT.

I.

This Appeal Is Not Timely Because the Statute of Limitations Has Run on Whatever Rights Appellants Might Have Had to Appeal.

Appellants are attempting to raise herein the constitutionality of California's Jurisdictional Strikes Act of 1947, despite the fact that the constitutional validity thereof was determined by the California Supreme Court in the first *Seven Up* case decided five years ago. (*Seven Up etc. Co. v. Grocery, etc. Union,* 40 Cal. 2d 368.)

That decision was made on appeal from a judgment of dismissal, based on the merit, by the trial court.

Since the appeal was from the judgment, as distinguished from a temporary injunction as in *Montgomery v. Ledbetter,* 344 U. S. 178, *supra,* appellants' only recourse of further testing the validity of such statute was by way of appeal at that time to this United States Supreme Court.

Having failed to appeal at that time, appellant cannot now, five years later, attempt to raise that same question in this same Seven Up case for the statute of limitations on their doing so has long since expired. (Rules 10 and 11, Supreme Court Rules.)

II.

This United States Supreme Court Is Without Jurisdiction to Review This Case Because the State Court Decree Is Not Final.

It is fundamental that in order for this Supreme Court of the United States to have jurisdiction to review a state court judgment, such judgment must be "final" within the meaning of 28 U. S. C. Sec. 1257.

> *Montgomery v. Ledbetter*, 344 U. S. 178, 97 L. Ed. 204, 73 S. Ct. 196.

> And ". . . for a judgment of an appellate court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court . . . directed.'"

> *Gospel Army v. City of Los Angeles*, 331 U. S. 543, 91 L. Ed. 1662, 1665.

> Moreover, "To be appealable the judgment must be not only final, but complete. (Citation of cases.) And the rule requires that the judgment, to be appealable, should be final not only as to all the parties, but as to the whole subject-matter. . . ."

> *Collins v. Miller*, 252 U. S. 364, 371, 64 L. Ed. 616, 619, 40 S. Ct. 37.

The possibility that matters left open by a state court's judgment may generate additional constitutional questions militates against its finality.

> *Republic Natural Gas Co. v. Oklahoma* (1948), 334 U. S. 62, 92 L. Ed. 1212, 68 S. Ct. 972.

And state court judgments may ordinarily be reviewed only upon an order or judgment disposing of the whole case and adjudicating all rights.

Republic Natural Gas Co. v. Oklahoma, supra.

The holding of the court below was to reverse the judgment of the trial court insofar as it awarded injunctive relief and to affirm that court's judgment insofar as it awarded damages. The trial court was also instructed to permit the defendants to amend their answer and to allege and then to prove additional facts, if they are able to do so, that the plaintiff is engaged in interstate commerce.

The application of the above principles to the holding of the California Supreme Court shows that such Court's judgment is not "final" as is required for this Court to have jurisdiction of it on review:

(1) The litigation has not ended so that the trial court has only ministerial acts to perform. To the contrary, the trial court must now allow an amendment to the defendants' answer, allow the introduction of additional evidence, and then make a determination as to whether injunctive relief shall be granted.

(2) For the same reasons, the judgment is not "complete" or "final" as to the "whole subject matter"; the only determination made is that the plaintiff is entitled to damages.

(3) Whether interstate commerce is or is not affected, *which has yet to be determined*, might well generate

"constitutional questions"; thus far, none actually have arisen under the facts presented.

(4) The judgment clearly does not "dispose of the whole case" nor "adjudicate all rights."

As this Supreme Court has previously so aptly stated:

> "Only one branch of the case has been finally disposed of below. Therefore none of it is ripe for review by this Court."
>
> *Collins v. Miller, supra,* 64 L. Ed 616, 619,

quoted with dispositive approval in

> *Republic Natural Gas Co. v. Oklahoma, supra,* 92 L. Ed. 1212, 1222.

And:

> "Appellant, of course, has the burden of affirmatively establishing this Court's jurisdiction. (Citation.) The policy against premature constitutional adjudication demands that any doubts in maintaining this burden be resolved against jurisdiction."
>
> *Republic Natural Gas v. Oklahoma, supra,* 92 L. Ed. 1212, 1222.

Therefore, since the judgment is not "final" within the meaning of 28 U. S. C. Sec. 1257, this Supreme Court is without jurisdiction and the appeal should be dismissed.

III.

This Supreme Court Is Without Jurisdiction to Review This Case Because There Is No Substantial Federal Question Presented or Involved.

A. There Is No Showing That a Federal Question Was in Fact Decided or Involved, Nor Is There Even a Showing That Interstate Commerce Is Affected.

The rule is that it is essential in order for this Supreme Court to have jurisdiction to review a state court decision on "federal question" grounds, that it be clearly shown that the state court actually decided a Federal question.

> *Black v. Cutter Laboratories* (1956), 351 U. S. 292, 100 L. Ed. 1188, 76 S. Ct. 824;
>
> *Durley v. Mayo* (1956), 351 U. S. 277, 100 L. Ed. 1178, 76 S. Ct. 806.

A mere discussion of Federal questions in the opinion of a state court is insufficient to give this Supreme Court jurisdiction to review, for in the words of this Court, "This Court, however, reviews judgments, not statements in opinions. (Citation of cases)."

> *Black v. Cutter Laboratories, supra*, 100 L. Ed. 1188, 1196.

And where, from a ruling of a state court, it is uncertain whether that court did or did not pass upon a Federal constitutional question, the Supreme Court will construe the state court's decision as not having passed upon the constitutional question.

> *Armstrong v. Armstrong* (1956), 350 U. S. 568, 100 L. Ed. 705, 76 S. Ct. 629.

In applying these principles to the instant case, it must be remembered that the holding of the court below was to affirm the trial court's judgment for damages and to reverse its judgment insofar as it awarded injunctive relief.

In its decision, the California Supreme Court states that on the present state of the record, it appears desirable to permit the defendants to amend their Answer to allege and prove, if they are able to do so, that the plaintiff is engaged in interstate commerce. Thus, there has been no showing thus far that interstate commerce is affected; nor has it been determined that the Federal laws are applicable; and, therefore, no Federal question has been decided.

The effect of the reversal as to injunctive relief makes this clear. In California, the effect of such a reversal is to vacate the judgment as to the permanent injunction and to leave the case "at large" for further proceedings, as if it had never been tried on the injunction issue, and as if no permanent injunction had ever been rendered. (See generally, *Central Savings Bank v. Lake* (1927), 201 Cal. 438, 443.) The preliminary injunction, of course, remains in effect until a final determination of the case on its merits as to the issue of equitable relief.

The unqualified reversal of the judgment with reference to the injunction, without direction to the trial court is effective to remand the case for new trial on the issue of whether an injunction should be granted, and places the parties in the same position as if the case had never been tried on the application for the injunction. (*Gospel Army v. City of Los Angeles*, 331 U. S. 543, 67 S. Ct. 1428, 91 L. Ed. 1662.)

In *Hall v. Superior Court in and for Los Angeles County*, 45 Cal. 2d 377, the California Supreme Court held that an unqualified reversal remands the cause for a new trial and places the parties in the trial court in the same position as if the cause had never been tried, with the exception that the opinion of the court on appeal must be followed so far as applicable, even if there has been only a partial reversal of judgment.

Where a preliminary injunction was granted, as here, and a judgment in favor of plaintiff was reversed, and a new trial granted, it was held that the granting of a new trial did not entitle the defendant to a dissolution or modification of the injunction. (*Hess v. Winder*, 34 Cal. 270.)

Thus, in the instant case, in accordance with the decision of the California Supreme Court, on the remand to the trial court, the issue would be tried as to whether respondent is engaged in commerce and is covered by the Labor-Management Relations Act of 1947. If the trial court finds that it is, then by direction of this Court, the preliminary injunction would be dissolved and judgment would be entered against respondent on this issue. If on the other hand, the trial court finds and concludes that respondent is in *intra*state commerce as it contends, then judgment would issue granting respondent a permanent injunction.

In any event, the important fact remains that there has been no showing thus far that interstate commerce is affected and accordingly no Federal question has been decided nor has one yet been involved.

B. Recent Decisions of the United States Supreme Court Are Decisive of This Case for They Show That State Courts Retain Their Jurisdiction to Remedy Tortious Activities by Damages Even Though the Field Involved Is Labor Relations and Even Though the N. L. R. B. Might Grant Partial Relief.

In a series of recent decisions this United States Supreme Court has made it clear that if the activity complained of is of the type over which state courts traditionally have jurisdiction (that is, breaches of contracts and torts), then even though such activity also constitutes an unfair labor practice, state courts have jurisdiction of the subject matter.

On May 26, 1958, this United States Supreme Court decided *International Association of Machinists v. Gonzales,* 26 L. W. 4355, which involved a *breach of contract* action, and *International Union U. A. W., et al., v. Russell,* 26 L. W. 4347, involving a *tort* action, and as recently as June 2, 1958 it denied certiorari in *International Brotherhood of Teamsters, Local 174 v. Selles* (U. S. S. C. October 1957 Term, Case No. 649 [*Selles v. Local 174, etc.,* 314 P. 2d 456]), thereby affirming the Washington state court judgment for money damages won by a truck driver in a *tort* action against a union.

In the *Gonzales* case, Gonzales, who was wrongfully expelled from the union of which he was a member, sued that union for reinstatement and damages. As stated by the United States Supreme Court, the question concerned the extent to which the Labor Management Relations Act "excluded the exercise of state powers." The majority opinion stated that:

> ". . . there may be embedded circumstances that could constitute an unfair labor practice under §8(b)(2) of the Act."

and the dissent emphasized that:

> ". . . the uncontested facts disclose the probability of a §8(b)(2) unfair labor practice, the existence of—[which]—must for pre-emption purposes be assumed."

In deciding that the state court did have jurisdiction of the controversy, the majority stated that:

> "As *Garner v. Teamsters Union*, 346 U. S. 485, could not avoid deciding, the Taft-Hartley Act undoubtedly carries implications of exclusive federal authority. Congress withdrew from the States much that had theretofore rested with them. But the other half of what was pronounced in *Garner—that the Act 'leaves much to the states.'—is no less important.* See 346 U. S. 25 488. The statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating eludication. (See *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 474-477. (Emphasis added.)
>
> * * * * * * * *
>
> "The National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages."
>
> * * * * * * * *
>
> "And the possibility of *partial relief* from the Board *does not*, in such a case as is presented, *deprive a party of available state remedies for all damages suffered.* See *International Union, United Automobile Workers v. Russell*, 26 L. W. 4347.
>
> "If as we held in the *Laburnum* case, certain state causes of action sounding in tort are not displaced

simply because there may be an argumentative coincidence in the facts adducible in the tort action and a plausible proceeding before the National Labor Relations Board, a state remedy for breach of contract also ought not be displaced by such evidentiary coincidence when the possibility of conflict with federal policy is similarly remote." (Emphasis added.)

In the *Russell* case, Russell sued the union for damages for malicious interference with his lawful occupation.

In this case, too, as in the *Gonzales* case, the question as stated by the Court was:

"The principal issue of law is whether the state court had jurisdiction to entertain Russell's amended complaint or whether that jurisdiction had been preempted by Congress and vested exclusively in the National Labor Relations Board."

In deciding the case this Court *assumed* that the activity complained of constituted an unfair labor practice over which the Board would have had jurisdiction, the same assumption which was made in the *Laburnum* case, but in spite of such assumption this Court decided that the state court *did have* jurisdiction of the controversy.

It stated that:

". . . the Supreme Court of Alabama reversed the trial court and upheld the jurisdiction of that court, *even though the amended complaint charged a violation of §8(b)(1)(A)* of the Federal Act. (Emphasis added.)

* * * * * * * *

"This case is similar to *Laburnum* in many respects. In each, a state court awarded compensatory and punitive damages against a union for conduct

which was a tort and *also assumed* to be an *unfair labor practice*. (Emphasis added.)

* * * * * * * *

"Petitioners assert that the possibility of *partial* relief distinguishes the instant case from *Laburnum*. It is our view that *Congress* had not made such a distinction and that it *has not*, in *either case, deprived a victim of the kind of conduct here involved of common-law rights of action for all damages suffered.*" (Emphasis added.)

The significance of these two cases is far-reaching. They demonstrate the principle that in actions either for *breach of contract* or for *tort*, state courts retain jurisdiction to remedy the wrongful conduct even though such activity constitutes an unfair labor practice over which the National Labor Relations Board normally would have jurisdiction and *even though the Board might grant partial relief to the wronged party for the conduct committed.*

In addition, in the *International Brotherhood of Teamsters, etc. v. Vogt, Inc.* (June, 1957), 77 S. Ct. 1166, this Supreme Court pointed out that a state can declare its own public policy, by its legislature or by its courts, both in the criminal and the civil field, and that there is a broad field in which the states can then enforce that policy by remedying tortious activities violating the effectuation of that policy.

In the first *Seven Up* case decided in 1953 (*Seven Up etc. Co. v. Grocery etc. Union*, 40 Cal. 2d 368), the California Supreme Court held as valid state law and state public policy the state's Jurisdictional Strikes Act of 1947, as against a constitutional attack. No appeal was taken from this judgment and it is now final.

As already pointed out, this United States Supreme Court in the *Russell* and *Gonzales* cases, *supra*, has recognized that state courts do have jurisdiction to grant *damages* for conduct which under state law is tortious in nature.

Since the activity complained of herein was held to be violative of California's valid public policy, the California courts have the power to remedy by damages a violation of such state policy.

C. The Conduct Engaged in by the Appellants in This Case Is Not Prohibited nor Protected by the Labor Management Relations Act, and Even if the Activities in Question Did [Contrary to the Facts] Substantially Affect Commerce, the Jurisdictional Strikes Act Is Within California Jurisdiction.

If the activity in question has not been prohibited by the Federal Labor Management Relations Act, and has not been protected by that Act, the States are free to regulate.

The activity in question here is not an *unfair labor practice* within the Federal Act, and is not otherwise prohibited by that act, *in view of the fact that no labor organization has been certified after a representation election.* In such a situation, *absent certification* of either union, the activity is *not an unfair labor practice* under Section 8.

Labor Mgmt. Rel. Act of 1947, Sec. 8(b)(4)(c); *Bennaz, etc. v. N. L. R. B.* (1956), 230 F. 2d 47;

N. L. R. B. Gen. Counsel Adm. Ruling, Case No. 1113 (Jan. 23, 1955), 35 Labor Relations Reference Manual 1533;

Address by General Counsel, N. L. R. B. (May 13, 1954), 34 *Labor Relations Reference Manual* 78, 79.

Congress, *in Section 8* of the National Labor Relations Act, expressly defines certain unfair labor practices engaged in by labor organizations for certain defined unlawful objects.

Section 10(a) provides that the Board is empowered to prevent any person from engaging in any unfair labor practice, LISTED IN SECTION 8 affecting commerce.

There are certain unfair practices engaged in by labor organizations which are NOT listed in Section 8 and NOT defined in the Federal Statute. The Statute does not cover, and Congress did NOT intend to cover, all unfair labor practices.

The activity here in question has *not been* PROTECTED by the Federal Act. *Where two unions are competing* for recognition as exclusive bargaining representative, *concerted activity by one of them to compel the employer to recognize it prior to certification by the National Labor Relations Board is not an activity protected by the Act,* since it would compel the employer to recognize and deal with a union that has not been selected voluntarily by the employees.

Hoover v. N. L. R. B. (1951), 191 F. 2d 380;

Ohio Ferro-Alloys Corp. v. N. L. R. B. (1954), 213 F. 2d 646;

N. L. R. B. v. Electronics Equipment Co., Inc. (1952), 194 F. 2d 650, and at 205 F. 2d 296 (1953).

Hoover v. N. L. R. B. (6th Cir., 1951), 191 F. 2d 380, involved

> "A boycott instituted by a union . . . during the pendency of proceedings for an election ordered

by the Board, to force the employer to recognize it as the bargaining agent of the employees in preference to a competing labor organization. . . ."

The Court said that if the employer, pending the election recognized one of the unions, it would be interfering with the Board's election procedures and would have been guilty of an unfair labor practice as well, violating Section 8(a)(1)—interference with and restraining its employees in the exercise of their right of self-organization through a representative of their own choosing. Thus, to recognize the union would be to do an illegal act. Then the Court said:

> "The Act does not confer absolute right upon employees to engage in every kind of strike or other concerted activity; and *the fact that certain concerted activity is explicitly protected by statute, does not mean that improper concerted activity is also protected.* For it is not necessary that such improper activities be explicitly excepted from the protection of the statute. The rights set forth in the Act are not to be considered as excluding the right to commit or participate in unfair labor practices or unlawful concerted activities; and *the courts have firmly established the rule that under the provisions of Section 7 of the Act, employees are not given any right to engage in unlawful or other improper conduct. International Union, etc. v. W. E. R. B.*, 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651." (Italics added.)

The *Hoover* case was followed in *Ohio Ferro-Alloys Corp. v. N. L. R. B.* (6th Cir., 1954), 213 F. 2d 646.

In *N. L. R. B. v. Electronics Equipment Co., Inc.* (2nd Cir., 1952), 194 F. 2d 650, during the pendency of an election between two competing unions, the employer fired

most members of one union. The fired employees circulated a letter requesting that employer's goods be boycotted. In deciding whether employees' activity was protected, the Court noted the *Hoover* doctrine:

> "As we read the court's decision in Hoover, and the Board's pre-Hoover rulings on which the court relied, *union activities in this kind of case are unprotected only if the union is in fact campaigning to compel unlawful conduct by the employer.*"

The Court remanded the case to N. L. R. B. to determine if the letters showed that the employees intended in fact to pursue the aim of an exclusive bargaining agreement.

In the subsequent hearing, 205 F. 2d 296 (1953), after the hearing officer had found that the intent was as expressed above, *the Court, per curiam with one dissent, denied enforcement of N. L. R. B.'s order of reinstatement.*

The *dissent pointed out,* correctly,

> *"But in denying enforcement, my brethren necessarily hold that action taken to obtain a security contract after consent to an election contest with a rival union, but before certification, is as a matter of law not protected activity under 29 U. S. C. §157."*

In the instant case, Appellants engaged in concerted interference with the business of respondent in the form of economic violence, and economic pressure, involving picketing, boycotting, unfair listing and other concerted activities engaged in the context of a jurisdictional strike to force respondent to recognize and sign a collective bargaining contract with appellant unions when appellants had not been selected by respondent's employees as their representative. Another labor organization had been almost unani-

mously selected by respondent's employees and had been properly recognized by respondent as collective bargaining representative as respondent was required to do by reason of its obligation to recognize a union which is the majority choice of its employees.

Collective bargaining relationship by way of a written contract has been in effect between respondent and one union for more than eighteen (18) years. Under all applicable laws, a certification election is not necessary, and there is a statutory and common law duty on an employer to recognize and deal with a union selected by employees.

The cases hereinbefore cited hold that it would be unlawful for respondent to recognize and deal with appellants and their concerted activities for such a purpose is not protected activity. Further, such activity engaged in by appellants is not an unfair labor practice in violation of the National Labor Relations Act, in view of the fact that neither of the competing unions had prior thereto been certified after a representation election. (L. M. R. A., Sec. 8(b)(4)(c).) Since no representation election had been held by the National Labor Relations Board, neither of the competing unions had been certified and thus the concerted activity did not violate Section 8(b)(4)(c) and the Act does not apply.

Since the activity complained of is neither *prohibited* nor *protected* by the Federal Act, regardless of whether interstate commerce is or is not affected, the California Courts certainly have jurisdiction to apply the Jurisdictional Strikes Act by awarding damages.

IV.

In Any Event, This Court Is Without Jurisdiction to Review This Case Because the State Court Judgment, Assuming Its Ruling Embodied a Federal Question (Contrary to Fact) Is Nevertheless Supported on Adequate State Grounds Apart From That Federal Question.

It is a settled principle of law that there can be no Supreme Court review of a state court's judgment, although such judgment embodies a ruling on a Federal question, if that judgment is supported on adequate state grounds independent of the Federal question.

Black v. Cutters Laboratories (1956), *supra*, 351 U. S. 292, 100 L. Ed. 1188, 76 S. Ct. 824;

Durley v. Mayo (1956), *supra*, 351 U. S. 277, 100 L. Ed. 1178, 76 S. Ct. 806.

Furthermore, this Supreme Court has said that it will not proceed with review of a state court judgment until the fact that the judgment does not rest on adequate and independent grounds of state law appears in the record.

Herb v. Pitcairn (1945), 324 U. S. 117, 89 L. Ed. 789, 65 S. Ct. 459.

In the instant case, it should be apparent that aside from all other consideration, the fact that there is no showing that interstate commerce is involved or affected should alone be sufficient to demonstrate that the decision of the state court awarding damages necessarily had to be based on state law grounds.

Conclusion.

Upon each and every ground stated in the Motion to Dismiss and for each and every one of the reasons stated herein, appellee submits that this Supreme Court should dismiss the instant appeal.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1958.

No. 169

GROCERY DRIVERS UNION LOCAL 848, ETC., *et al.*,
Appellants,

vs.

SEVEN UP BOTTLING COMPANY OF LOS ANGELES, INC.,
Appellee.

On Appeal From the Supreme Court of the State of California.

APPELLANTS' REPLY TO MOTION TO DISMISS APPEAL.

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Appellee.

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APPELLANTS' REPLY TO MOTION TO DISMISS APPEAL.

The sole reason for this reply is to correct erroneous references to the record below contained in Appellee's Motion to Dismiss and thereby avoid the necessity for this Court to examine the voluminous transcript.

Appellee has suggested, if not directly stated, that the instant case was decided at the state level on a theory of union violence. At pages 3 and 4 of its Motion to Dismiss, reference is made to testimony of alleged threats of violence occurring *seven years prior to the initiation of the instant case.* This alleged violence was the basis of a completely separate court action entitled: *American Union Alliance, etc., et al. v. American Federation of*

Labor, etc., et al., filed in the Superior Court of Los Angeles on *April 1, 1942* under case number 474935. Appellee's Exhibit 31 referred to on page 3 and 4 of the Motion includes the record proper of the 1942 separate and independent action. (Neither party has designated this Exhibit as part of the record on this appeal, but Appellee apparently seeks to rely upon it.) Appellee's assertion that the trial court in that case found that Appellants had made threats of violence is completely in error. In that case, the company union sought a preliminary and permanent injunction against Appellants and other unions on the theory of violence. The trial court on April 30, 1942 denied the application for preliminary injunction and on September 2, 1942, after a trial on the merits, entered a judgment of dismissal of the action and awarded costs of suit to the defendant unions.

The remaining assertions of violence found on page 4 of Appellee's Motion to Dismiss concern testimony of one company witness (Landin) as to happenings in *1942*. Nowhere in the present record does there appear any evidence or findings that violence or threats thereof occurred in the instant case. Furthermore, the present complaint does not allege any violence. The activities which are the basis of the *present action* filed in 1949 are completely disassociated from those occurring in 1942. The complaint in the instant case confines itself to activities occurring on and since June 9, 1949. [Clk. Tr. p. 6.] Moreover, counsel for Appellee stipulated during the trial that damages were not being sought for any activities occurring prior to 1949. [Rep. Tr. p. 146, line 19, to p. 147, line 10.]

At pages 8-11 of Appellee's Brief, it is contended that Appellants are foreclosed from appealing a final damage

award because of their failure to appeal to this Court from an earlier decision of the California Supreme Court reported at 40 Cal. 2d 368, 254 P. 2d 544. The earlier decision on its face shows that the Supreme Court reversed and remanded the *entire* case for trial on the merits of both the damage and injunctive aspects of the complaint. The State Supreme Court thus reversed the trial court which had sustained a demurrer to the complaint on the theory that the Jurisdictional Strikes Act was unconstitutional. The present appeal is from the *final award of damages after trial on the merits.* Obviously there was no final dispositive decision of the California Supreme Court in the earlier appeal on any aspect of the case.

At page 9 of the Motion to Dismiss, Appellee cites authority for the principle that judgments are not final for review purposes where something non-ministerial remains to be done by the trial court. These principles themselves clearly dispose of Appellee's "timeliness" contention with respect to the California Supreme Court decision of the prior appeal.

Appellee next suggests, if it does not seriously contend, that the present State Supreme Court award of damages is not reviewable because it is not "final". In this connection, Appellee concedes on pages 10 and 13 of its Motion that the *damage award is final* and not subject to any further action by the Supreme Court or any other court of California. Appellee appears to contend that because the injunctive aspect of the case has been remanded to the lower court for the taking of additional evidence, this deprives Appellants of the only opportunity which the law gives for appeal to this court of the damage aspect of the case. No cases are cited for such an extreme proposition which, if accepted by this Court, would deprive

litigants of rights of appeal conferred upon them by Title 28, United States Code, Section 1257(2). Stated shortly, the right of review would be lost with respect to any *final* awards of damages merely because some other separable aspect of the case may require further trial proceedings in the state court system. The California Supreme Court clearly treated the damage award as *separable* and *distinct* from the injunctive phase of the case and rendered a *final judgment* with respect to one and remanded the other.

Finally, Appellee contends that a Federal question has not been raised because the existence of interstate commerce is not shown on the record. In this connection, reference is made to the Jurisdictional Statement, pages 5-6 and pages 17-19 for a complete review of the timely efforts made by Appellants to prove interstate commerce affectation and the trial court's refusal to permit this proof. This situation is analogous to that before this Court recently in *Lambert v. California*, 2 L. Ed. 228, 231. In that case, the defendant was prosecuted under an ordinance making it unlawful for a convicted felon to remain in Los Angeles County for more than five days without registering. At the trial, the defendant offered proof that she lacked actual knowledge of the registration requirement and the trial court rejected this proof. In holding that the ordinance as applied in this case was unconstitutional, this Court stated:

> "We must assume that Appellant had no actual knowledge of the requirement that she register under this ordinance, *as she offered proof of this defense which was refused.*" (Emphasis added.)

This Court then held that the ordinance as applied to one *not having actual knowledge* was unconstitutional.

The analogy is patent. In *Lambert*, this Court for purposes of review assumed the existence of facts giving rise to the Federal question when proof of such facts was offered and refused at the trial level. In the instant case the Court should apply the same rule.

Respectfully submitted,

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Appellants,

vs.

SEVEN UP BOTTLING COMPANY OF LOS ANGELES, INCORPORATED,

Appellees.

On Appeal From the Supreme Court of the State of California.

SUPPLEMENTARY JURISDICTIONAL STATEMENT.

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Appellees.

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SUPPLEMENTARY JURISDICTIONAL STATEMENT.

The basis of this appeal is that an award for damages under the California Jurisdictional Strikes Act is repugnant to the National Labor Relations Act when applied to a labor dispute affecting interstate commerce.

The following facts distinguish the instant case from *Garmon* and justify its separate consideration:

1. The state court after hearing voluminous conflicting evidence on the subject ruled that the Seven Up Employees' Association was not a labor organization "financed in whole or in part, interfered with, dominated or

controlled by the employer" and therefore awarded damages on the sole ground that a jurisdictional dispute existed. In making this determination, the trial court received and evaluated the same type of evidence that the National Labor Relations Board would receive and evaluate in a complaint proceeding under Section 8(a)(2) of the Federal Act.

The peaceful picketing by the Union which was the basis of the state damage award would constitute "protected concerted activity" under Federal law if the National Labor Relations Board concluded, contrary to the state court, that the evidence established company interference, domination, or control of the Association. (*Mastro Plastics Corp. v. National Labor Relations Board*, 350 U. S. 270, 100 L. Ed. 309.)

2. All union picketing was peacefully conducted at retail stores carrying the Seven Up Company's product, that is, at the premises of the secondary employers. The trial court's sole finding was that such Union conduct "interfered" with the Company's operation. This squarely presents the question as to whether, through Section 303(a)(1) and (b) of the Federal Act, Congress intended to provide the exclusive factual circumstances under which private parties can obtain damages because of secondary picketing and to exclude state power to impose damages against labor organizations for conduct falling short of the proscriptions of Section 303. The trial court made no finding of "employee inducement" required to support a state court award of damages under Section 303.

3. The trial court found that the picketing was in connection with a dispute over representation of employees and work assignment between the defendant Union

and the Seven Up Employees' Association. The subject of damages to private parties arising from jurisdictional disputes over work assignments is regulated comprehensively under Section 303(a)(4) and (b) of the National Labor Relations Act. Here again the absence of state court findings that the Union "induced and encouraged employees' forecloses a damage award under the Federal Act and raises the question as to whether a state may expand the scope of jurisdictional disputes for purposes of private damages beyond the limited proscriptions contained in Section 303(a)(4) and (b) of the Federal Act.

None of the foregoing important questions of law are presented on the record or in the briefs filed in the *Garmon* case, No. 66, October Term, calendared for argument on January 19, 1959.

Respectfully submitted,

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SEVEN UP BOTTLING COMPANY OF LOS ANGELES, INCORPORATED,

Appellee.

On Appeal From the Supreme Court of the State of California.

Appellee's Reply to Appellants' Supplemental Jurisdictional Statement.

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Appellee's Reply to Appellants' Supplemental Jurisdictional Statement.

While we agree with Appellants' conclusion contained in their Supplementary Jurisdictional Statement that this Court should consider *Garmon* completely separate and apart from the instant case, we note that Appellants failed to state the most important reasons for such a conclusion.

One of those reasons is that any action on the part of this Court at this time in deciding the merits of this case would be a premature constitutional adjudication and such action would be based on assumptions of fact and theoretical conjectures. This is so because there has never ever in this case, as of this date, been any showing or determination that interstate commerce is affected or in

turn, that the Federal laws, upon which Appellants base their appeal, are in fact applicable.

The Court below directed the trial court to allow defendants (Appellants) to amend their Answer to allege and prove, if they are able to do so, that plaintiff (Appellee) is engaged in commerce. Thus far, the defendants (Appellants) have not done so but instead are pursuing this appeal on the *assumption* that interstate commerce is affected.

Furthermore, it is unquestioned that this case was tried on the theory that a *state* law had been violated; that the trial court based its decision on this theory and that the state appellate courts based their decisions on that same theory. At no time did any of the state courts apply the Federal law nor was it involved; accordingly a Federal question was not involved nor is it now presented to this Court.

Another reason that action by this Court on the merits of this case would result in premature constitutional adjudication is because the state court decree is not final: the whole case is not disposed of; all rights are not adjudicated; and, any doubts about whether Appellants have carried their burden of affirmatively establishing this Court's jurisdiction must be resolved against jurisdiction.

Whether or not the National Labor Relations Board might have passed on the question of whether the independent union was company dominated, as Appellants contend in their Supplementary Jurisdictional Statement, page 1, lines 6 through 21, is immaterial at this stage, because as this Court has recognized in the *Laburnum* case, *United Construction Workers v. Laburnum* (1954), 347 U. S. 656, 98 L. Ed. 1025, the power of a state court to award damages does not, by its very nature, conflict with the

jurisdiction of the National Labor Relations Board because that Board has no jurisdiction to award reparation.

While Appellants indicate under their point 2 on page 1 of their Supplementary Jurisdictional Statement that the only activity complained of occurred at secondary employers, the evidence upon which the judgment was founded did not involve strikes by employees of secondary employers, and the judgment was based upon concerted interference with the business of Appellee which conduct is not prohibited expressly by any provision of the Federal law and Appellants fail to cite any authority for the proposition that it is privileged or protected by the Federal statutes.

Even assuming the conduct were an unfair labor practice and violated the Federal law covering secondary boycotts and jurisdictional disputes, the state court has the power to award damages. The Federal law states that any court of competent jurisdiction has the power to award damages for violations of Sections 303(a)(1) and 303(a)(4) of the Act and "any court" includes state courts. (*International Longshoremen's Union v. Juneau Spruce Corp.* (1952), 342 U. S. 237, 96 L. Ed. 275.)

Potentially, then, the Board, a Federal court, and a state court could pass upon identical legal factual issues but the danger that the decisions might be different does not impair the power of any one of the three, including the state court, to decide them.

In the event of a conflict, the remedy of the aggrieved party is to resolve the cases by appeal on the merits as pointed out by the United States Supreme Court in *Amalgamated v. Richman Bros.* (1955), 348 U. S. 511, 99 L. Ed. 600, and the question relates to the merits, not to be jurisdiction of the body to pass on the case.

Here, however, the Appellants wrongly question the basic power of the state court to even adjudicate the matter when the state court clearly possesses that power, under the Federal law.

The state court also possesses the power to adjudicate and to grant damages when it applies its own state tort law, as it did in the instant case. Congress at no time intended to replace the state's traditional power to remedy torts by way of damages. This Court recognized that intention in the *Laburnum* case when it held that the state court had the power to apply its own tort law and award damages. But this Court has gone further than that in recognizing the state's power; it has already decided that one afforded a remedy by way of reparation under the National Labor Relations Act may nevertheless also be afforded a right to damages for a tort or breach of contract under state law. (*International Union v. Russell* (1958), 356 U. S. 634, 2 L. Ed. 2d 1030 and *International Association of Machinists v. Gonzales* (1958), 356 U. S. 617, 2 L. Ed. 2d 1018.) The principal reason for such holdings was that the Federal law was not as complete as the remedy afforded by the state law. In other words, the state law, over which the state court had jurisdiction to apply and to award damages, was based on a tort not covered by the Federal law.

Viewed in this respect the state tort law involved here also is based on a tort not covered by the Federal law and the state is operating in an area not controlled by Federal law. Based upon those cases, the state court here likewise

has the power to award damages; and there is no substantial question involved here for this Court to decide.

Therefore, we submit, as do Appellants, that this case should be considered separately from *Garmon;* but we further submit that this Court should dispose of this case by granting the Motion to Dismiss Appeal on file herein.

Respectfully submitted,

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Appellee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 169

GROCERY DRIVERS UNION LOCAL 848, ETC., *et al.*,
Appellants,

vs.

SEVEN UP BOTTLING COMPANY OF LOS ANGELES, INCORPORATED,
Appellee.

On Appeal From the Supreme Court of the State of California.

PETITION FOR REHEARING.

Grounds for Rehearing.

Appellee presents the following grounds requiring this Court to grant a rehearing in this case:

1. The decision insofar as it might be interpreted as denying the State Court from granting damages is *inconsistent* with the *Garmon* case, because the National Labor Relations Board has clearly determined that the type of jurisdictional strike conduct here involved is neither protected nor prohibited by the Labor Management Relations Act, 1947. (Taft-Hartley.)

2. The decision leaves uncertain the question as to whether Appellee-Employer should be granted complete relief by way of injunction and damages.

3. The decision fails to clarify the point that the State's compelling interest in this particular situation allows it to grant complete relief.

4. The decision fails to consider the application of the due process clause of the Constitution.

5. The decision overlooks and completely disregards the distinctions, both factual and legal between *Garmon* and this case.

6. The decision as it stands is vague and uncertain in its application.

ARGUMENT.

I.

This Court's Decision Here Is Inconsistent With Its Decision in Garmon Because the Board Has Determined the Conduct Here to Be Neither Protected Nor Prohibited.

The Court remanded this case ". . . for modification in light of *San Diego Building Trades Council v. Garmon*" (No. 66, O. T. 1958). The *Garmon* decision is based on the theory that a State Court lacks jurisdiction to regulate organizational or recognition picketing which might be *protected* or *prohibited* by the Taft-Hartley Act.

The National Labor Relations Board, by compelling precedents, has determined that the type of jurisdictional strike activity involved in this case is not protected nor prohibited by the Taft-Hartley Act. Therefore, insofar as the remand applies to the damage aspect of the State Court's decision, and assuming the remand might mean that the State Court lacks jurisdiction to grant damages, the remand is erroneous and is inconsistent with the theory of the *Garmon* case.

A. To begin with, there is no question but that a jurisdictional dispute was involved here and the National Labor Relations Board has repeatedly clearly determined that the type of jurisdictional dispute conduct engaged in by the *Appellant Union* is *not* protected activity.

Hoover v. N. L. R. B., 191 F. 2d 380 (1951);

Ohio Ferro-Alloys v. N. L. R. B., 213 F. 2d 646 (1954);

N. L. R. B. v. Electronics Equip. Co. Inc., 194 F. 2d 650 (1952) and 205 F. 2d 296 (1953).

B. Likewise, the National Labor Relations Board has also clearly determined that such conduct is *not prohibited.* This is because such conduct is an unfair labor practice *only*, but *only if* the incumbent union has been certified as the exclusive bargaining representative pursuant to a representation election conducted in accordance with Section 9(f), (g) and (h) of the Act.

L. M. R. A., Sec. 8(b)(4) (c), 29 U. S. C. A., Section 158 (b)(4)(d), 29 U. S. C. A., Section 141, 151, 160 L;

Bennaz, Etc. v. N. L. R. B., 230 F. 2d 47 (1950);

N. L. R. B. Gen. Coun. Adm. Rule, Case 1113, 1-23-55, 35 L. R. R. M. 1533;

Address by Gen. Coun. of N. L. R. B.,, 5-13-54, 34 L. R. R. M 78 and 79.

See:

Brown v. Roofers & Waterproofers Local 40, 86 Fed. Supp. 50 (1949);

LaBurnum v. Los Angeles Building Trades Council, 84 Fed. Supp. 629 (1949);

Juneau Spruce v. I. L. W. U., 83 Fed. Supp. 224, *et seq.*;

Carpenters v. Sperry, 170 F. 2d 863.

Here, neither of the unions was certified by the Board. Therefore, the conduct by the Appellant Union could not possibly be prohibited by the National Labor Relations Board under the Act.

If the *Garmon* decision, in either the majority or the concurring opinions, is to have any meaning in the practical application of the law, the above conclusion that the conduct is *not protected nor prohibited* must be so.

The majority stated:

> ". . . the Board may decide that an activity is neither protected nor prohibited and thereby raise the question whether such activity may be regulated by the States."

and that:

> ". . . In the absence . . . of compelling precedent . . .it is not for this Court to decide whether such activities are subject to state jurisdiction."

The concurring justices said, with respect to the *Russell* (356 U. S. 634) and *Laburnum* (347 U. S. 656) cases:

> ". . . it was possible to decide that question *without prior reference* to the National Labor Relations Board . . ." (Emphasis added.)

and that:

> "To determine the need for initial reference to the Board . . ."

Here, there is no "need for initial reference to the Board." It is not only possible but proper in accordance with *Garmon* to decide this case without prior reference to the Board in accordance with the Board's compelling precedents that the activity involved here is *neither protected nor prohibited.*

Therefore, the remand insofar as it applies to damages and as it now stands, is *inconsistent* with *Garmon*. To harmonize the two decisions, this Court should affirm the decision as to damages.

II.

Modification Results in Complete Relief to the Appellee.

In view of the fact that the National Labor Relations Board has clearly determined that the type of jurisdiction dispute conduct here involved is neither protected nor prohibited, it seems clear in the light of *Garmon,* that the California Supreme Court should have affirmed the judgment of the trial court awarding injunctive relief and damages to appellee. However, the California Court granted leave to appellants to alleged and attempt to prove that appellee is engaged in commerce and covered by the Taft-Hartley Act.

Insofar as this Court's modification applies to that portion of the California Supreme Court's decision, it seems to appellee that there is no need for a trial on the issue of coverage of appellee by the Federal Statutes, and that the judgment for damages and injunctive relief should be sustained by this Court. Particularly in view of the fact that appellants conceded that appellee is in intrastate commerce. (Resp. Br. p. 30.)

> "No other information appears which would in any way show that appellant is engaged in or affects interstate commerce within the meaning of the Labor Management Relations Act of 1947. There is no showing of fact whatsoever which would show the appellant to be under the jurisdiction of the National Labor Relations Board."

The California Supreme Court also stated:

> ". . . There is no allegation showing that plaintiff was engaged in a business affecting interstate commerce and hence the Labor Management Relations Act of 1947, supra, has no application." (40 Cal. 2d 368-372, 254 P. 2d 544, 547 (1953).)

However, we respectfully submit that the opinion of this Court should make a determination on these issues instead of leaving such determination to the California Supreme Court with the result that this case may come before this Court for a second time as in *Garmon*.

III.

The Compelling State Interest in Regulating the Conduct Involved Here Supports the Theory That the State Has Jurisdiction to Afford Complete Relief.

The lower court found that bona fide and valid contracts with one of the Unions had been in effect for many years and that both unions were proper unions and not dominated by the Employer, and that the Appellants were seeking to destroy the Employer's business for the purpose of forcing the employer to breach its contract with one of the unions and to sign a contract with the Appellant union. Such activity constituted a tort under the statutory law of California and the common law of almost all the States, just as surely as though Appellants had used guns or had destroyed the Employer's physical property or tortiously taken possession of its plant. The complaint did allege an assault upon one of the employees. [Tr. 15, 4th Cause of Action, 4th paragraph.]

The California Jurisdictional Strikes Act is a statutory regulation of the common law that inducing a breach of contract or inducing persons not to deal with another, or interfering in the conduct of his business, constitutes a tort

unless such interference is privileged. (*Restatement, Torts, 766.*)

It is also clear that where a group of persons not in the employ of the appellee engaged in such interference with the Employer, and where there is no labor dispute between the appellee and its own employees, such interference is not protected or privileged. (*Restatement, Torts,* 806, 808, 813-816); 29 Cal. Jur. 2d 705.) The jurisdictional strike conduct touches interests deeply rooted in local feeling and responsibility and Congress has not expressly or impliedly deprived the State of California of the power to regulate such activity. The conduct is not subject to regulation by the National Labor Relations Board. No provision has been made by Congress at any time to cover problems of torts.

> *United Construction v. Laburnum,* 347 U. S. 656, 665, 666, 669.

The State of California has legislatively defined the conduct involved herein to be a tort. The Supreme Court of California unanimously held this important declaration of public law by the California Legislature to be constitutionally valid.

> *Seven Up Bottling Company, etc. v. Grocery Drivers Local 848,* 40 Cal. 2d 368, 354 P. d 544 (1953).

Such conduct is a tort by normal rules of society. Congress did not intend to displace State jurisdiction to provide a remedy to a party whose rights have thus been violated. Examples of other torts of a non-violent character are libel and slander.

Therefore, unless the modification is clarified, the State Court should afford complete relief in accord with its "compelling state interest" as set forth in *Garmon.*

IV.

Any Other Interpretation of the Modification Decision Would Deprive the Employer of Property Without Due Process of Law.

The business of appellee is a property right protected by the Constitution of the United States.

Coppage v. Kansas, 235 U. S. 1, 14.

As was said by Mr. Justice Brandeis for the whole Court is *Dorchey v. Kansas,* 272 U. S. 306, 311, 71 L. Ed. 248, 269:

> "The right to carry on business . . . has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification, but a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. . . ."

If this Court's decision were interpreted so as to deny the Appellee-Employer damages, in the event its business affected interstate commerce, then the Employer would be deprived of property without due process of law because the Board is not empowered to grant damages; the activity is neither protected nor prohibited by the Federal Law. The effect of this Court's decision is to hold that the State Court lacks jurisdiction to grant damages under its own law, even though the conduct which causes the injury is not covered by Federal Law. Such an interpretation frustrates application of the legal maxim that there must be a remedy for every wrong. Surely this Court does not intend to thus deprive appellee of the constitutional guarantees of the Fourteenth Amendment.

V.

The Facts, Issues and Law Involved Require That This Case Be Considered Separately From Garmon.

In their Supplementary Jurisdictional Statement, the Appellants state:

> "The following facts distinguish the instant case from Garmon and justify its separate consideration." (p. 1.)

and

> "None of the foregoing important questions of law are presented on the record or in the briefs filed in the Garmon case . . ." (P. 3.)

In Appellee's Reply to Appellants' Supplemental Jurisdictional Statement, Appellee stated:

> ". . . we submit, as do Appellants, that this case should be considered separately from Garmon; . . ." (P. 5.)

Thus, both parties have argued to this Court that this case is different from *Garmon* both factually and legally and Appellees re-assert that contention here.

Without being redundant by repeating these arguments of both parties, Appellee poses here one of the problems giving rise to the arguments as an illustration of the need for separate consideration and determination of this case.

Practically all of the decisions of this Court dealing with the problem of pre-emption have primarily involved the jurisdiction of the State Courts as against the jurisdiction of the National Labor Relations Board. One of the cases, however, dealing with that general problem has held that "any Court," *including a State Court*, has the jurisdiction to award damages for violations of Section

303 of the Labor Management Relations Act independently of what the Board determines, and without a prior determination by the Board.

> *International Longshoremen's Union v. Juneau Spruce Corp.*, 342 U. S. 237, 96 L. Ed. 275 (1952).

Section 303(b) of the Act provides:

> "(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, *or in any other court having jurisdiction of the parties*, and shall recover the damages by him sustained and the cost of the suit." (Italics added.) (29 U. S. C., Sec. 187(b).)

And, there are cases where the same factual situation was involved but the Board and the District Courts made adverse rulings and both decisions were upheld on appeal. See *National Labor Relations Board v. Deena Artware, Inc.*, 198 Fed. 645 (1957), and *United Brick Workers v. Deena Artware, Inc.*, 198 F. 2d 637 (1952), where the Board in an unfair labor practice proceeding found that there had been no secondary picketing, but a District Court in an action under Section 303 found that there had been such picketing and awarded damages. Both cases were uphld on appeal.

This emphasizes one of the important problems here involved. Even *assuming* the activity is prohibited by the Federal law because it is an unfair labor practice, nevertheless, the State Court as a court of competent jurisdiction under the *Juneau Spruce, supra*, case, has jurisdiction to award damages against appellants for engaging in

secondary boycott and jurisdiction strike activities in violation of Section 303(a). (29 U. S. C. A., Sec. 187(a), (b).) Whether it must apply the Federal law as to damages, or whether if the activity is not prohibited by the Federal law and is therefore unregulated, it can apply a State law as to damages in that area unregulated by the Federal law, is unknown at this time.

While the conflict in decisions that the Court has been concerned about, might occur here where Congress has provided for the award of damages and potentially the Board, prohibiting unfair labor practices, a Federal Court and a State Court can pass upon identical legal and factual issues, the danger that the decisions might be different does not impair the *power* of any one of the three, including the State Court, to decide them. This honorable Court, of course, is constitutionally charged to make application of the laws uniform by acting as the appellate court of last resort.

The *Garmon* decision does not solve the problem posed. Therefore, this Court should grant this Petition for Rehearing and entertain both written and oral arguments on all of the problems involved.

VI.

The Decision Is Vague, Uncertain, and Ambiguous.

This Court by its decision here has created problems which can be resolved only by additional litigation and needless expense to all parties—unless this Court reconsiders its action in this case and allows full argument by counsel.

As it now stands, the decision:

(1) Leaves undecided the question as to whether the State Court should grant complete relief because

the activity involved is neither protected nor prohibited;

(2) Leaves unsettled whether the California Court should affirm or reverse its decision as to:

(A) Damages;

(B) Injunctive relief;

(C) Directing the trial court to take evidence on commerce.

(3) Creates uncertainty in the law insofar as an action for damages is concerned for it fails to settle the problem whether a party must first go to the Board when the Federal Law expressly authorizes State Courts to award damages as in Section 303 actions. The decision implies that a litigant as a condition of filing a damage action in Court, must first get a ruling from the National Labor Relations Board as to whether conduct complained of in a damage action is protected conduct. The Federal Statute does not authorize nor does the National Labor Relations Board issue rulings as to whether certain conduct is protected. The Board only acts upon a charge filed by any person, and then only rules as to whether a specific section of the Act has been violated by the party charged. Neither the General Counsel nor the Board have statutory authority to initiate proceedings leading to a determination as to whether certain conduct is protected or prohibited.

(4) Fails to decide whether Section 303 and the related sections pre-empt the field as to their subject matter.

(5) Indicates without deciding that a State Court has jurisdiction to apply its own Jurisdictional Strikes Law, but fails to state in what circumstances.

To detail the additional uncertainties unresolved and created would require a repetition, in part, of some of the arguments made herein, as well as those presented in the briefs on file in this case.

Conclusion.

Appellee respectfully submits that the proper disposition of this case can be made only after full briefing and oral argument by both counsel.

In the alternative, Appellee requests an elaboration of the decision with instructions, if necessary.

Respectfully submitted,

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By CARL M. GOULD,
Attorneys for Appellee.

Certificate of Counsel.

Carl M. Gould of Hill, Farrer & Burrill, and Thomas P. Menzies of counsel for Seven Up Bottling Company of Los Angeles, Incorporated, do hereby certify that in their judgment the Petition for Rehearing is well founded and is not interposed for delay.

CARL M. GOULD
THOMAS P. MENZIES.